

31 January 2019

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REF: SHA/19996

APPEAL AGAINST NHS ENGLAND SOUTH EAST AREA TEAM, NHS COMMISSIONING BOARD ("NHS ENGLAND") DECISION TO REFUSE AN APPLICATION BY DELMERGATE LTD FOR INCLUSION IN THE PHARMACEUTICAL LIST OFFERING UNFORESEEN BENEFITS UNDER REGULATION 18 AT THE NEW RETAIL DEVELOPMENT, CASTLE HILL LOCAL CENTRE, EBBSFLEET GARDEN CITY

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1 Outcome

- 1.1 The Pharmacy Appeals Committee ("Committee"), appointed by NHS Resolution, quashes the decision of NHS England and redetermines the application.
- 1.2 The Committee determined that the application should be refused.

Advise / Resolve / Learn

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Accredited
Unit 7, 2023



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Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk**1 The Application**

By application dated 7 February 2018, Delmergate Ltd ("the Applicant") applied to NHS Commissioning Board ("NHS England") for inclusion in the pharmaceutical list offering unforeseen benefits under Regulation 18 at the new retail development, Castle Hill Local Centre, Ebbsfleet Garden City . In support of the application it was stated:

- 1.1 In the Applicant's view this application should not be refused pursuant to Regulation 31 for the following reasons:
 - 1.1.1 No other pharmacy in same or adjacent premises so not applicable.
- 1.2 A major new commercial centre, up to 15,000 homes, improved public transport and seven city parks are planned for Ebbsfleet Garden City.
- 1.3 Developers are already on site building a wide range of new houses and apartments. A new primary school in Eastern Quarry opened to pupils in September 2017, as well as a new restaurant and pub, to be followed by a hotel.
- 1.4 There are currently seven developers on site creating hundreds of new homes across the Garden City including at Ebbsfleet Green where Redrow is building 950 new homes and has a show home open and at Springhead to build a further 123 homes.
- 1.5 Keepmoat had plans approved for 598 new homes at Northfleet East on the banks of the River Thames.
- 1.6 The PNA for does not currently identify the need for a pharmacy at this location and this application is therefore submitted under Regulation 18 as an unforeseen benefits application.
- 1.7 The proposal is to open a pharmacy at the Castle Hill Local Centre in Ebbsfleet Garden City. Planning has been granted for the local centre which will serve as a hub for the local community and provide a range of retail offerings in a convenient location.
- 1.8 Planned services include a new supermarket and smaller units for non-food retail, small businesses, a cafe and a take-away uses in the first new village centre to provide services to local residents.
- 1.9 A new primary school, Cherry Orchard, opens in the area next month and eventually there will be 6,250 homes in three villages in Eastern Quarry.

- 1.10 Social housing provider Clarion was given permission for a further 37 houses and 31 apartments in Castle Hill, all of which will be shared ownership. These will provide people on average salaries in North Kent the chance to get on the property ladder in the Garden City.
- 1.11 Given the not insignificant population of the area and the requirement for patients to leave the area in order to access any type of primary care services, including pharmaceutical services, granting the application would secure better access to pharmaceutical services for the relevant population.
- 1.12 In addition to providing dispensing services, the pharmacy would provide all other essential, advanced and enhanced services that are commissioned by NHS England or the local authority. Providing access to these services will be of significant benefit for patients, particularly those who may have difficulty in accessing other areas, such as the elderly, infirm disabled, or parents with young children (i.e. those who share a protected characteristic).

In response to “Please explain how you intend to secure the unforeseen benefit(s)” the Applicant stated:

- 1.13 By opening a pharmacy at the proposed location.

2 The Decision

NHS England considered and decided to refuse the application. The decision letter dated 3 October 2018 states:

- 2.1 NHS England have considered the above application and are am writing to confirm that it has been refused.
- 2.2 Please find attached decision minutes for full reasoning.
- 2.3 The regulations referred to in these minutes are in all cases the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 and later amendments, and will be referred to as “the Regulations”.
- 2.4 For the purposes of these minutes the NHS England – South East (Kent, Surrey, Sussex) Pharmaceutical Regulation Services Committee will be referred to as “the Committee”. The Committee is authorised to deal with all relevant applications and other relevant matters arising from the provisions of the Regulations on behalf of the NHS England – South East (Kent, Surrey, Sussex).
- 2.5 TSSB stated that the case to be discussed was as follows:-
- 2.6 One application made under Regulation 18 from Delmergate Ltd, New Retail Development, Castle Hill Local Centre, Ebbsfleet Garden City (DA10 0DF postcode used), offering unforeseen benefits.
- 2.7 Declarations of interest.
 - 2.7.1 There were no declarations of interest.
- 2.8 Oral Hearing
 - 2.8.1 On the basis of the information before the members, it was agreed that it was not necessary to hold an oral hearing.
- 2.9 Notification Exercise – comments received from parties

- 2.10 The statutory notification exercise was carried out by Primary Care Support England and comments were received from the parties below:
- 2.10.1 Ackers Ltd
 - 2.10.2 Kent LPC
 - 2.10.3 Kent HWB
- 2.11 Comment by Charles Russell Speechlys (CRS) on behalf of Ackers Ltd:
- 2.11.1 CRS asked NHS England to refuse the application on the basis that it should not have been made under Regulation 18, Unforeseen Benefits, as development of the area, and subsequent possible gap in provision was referenced in both the 2015 and 2018 PNAs for the area.
 - 2.11.2 If the application was to be considered under Regulation 18, then CRS considered that it would cause significant detriment to proper planning in respect of the provision of pharmaceutical services; this is due to NHS England's plan to invite the existing providers to offer to provide pharmaceutical services in the area, rather than accept a new contractor to join the pharmaceutical list for the area.
- 2.12 Comment by Kent Health & Wellbeing Board:
- 2.12.1 The HWB felt that the application should not be considered under Regulation 18, Unforeseen Benefits, as development of the area, and any potential future gap in provision were referenced in both the 2015 and 2018 PNAs for the area; the HWB letter quoted the relevant sections of the PNA.
- 2.13 Comment by Kent Local Pharmaceutical Committee:
- 2.13.1 The LPC felt that the application should not be considered under Regulation 18, Unforeseen Benefits, as development of the area, and any potential future gap in provision were referenced in both the 2015 and 2018 PNAs for the area; the LPC letter quoted the relevant sections of the PNA.
 - 2.13.2 However, the LPC supported an expansion of existing services in this area.
- 2.14 Rebuttal by Rushport Advisory on behalf of the Applicant:
- 2.14.1 Rushport Advisory considered that CRS had not correctly interpreted the meaning of Regulation 18, in that 'improvements or better access that would be secured were or was not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1', which related to information to be included in a pharmaceutical needs assessment. Paragraph 4 requires a statement of the pharmaceutical services that the HWB (*sic*) has identified as services that are not currently provided, but if they were would secure improvements of (*sic*) better access either now or in specified future circumstances.
 - 2.14.2 Rushport Advisory considered that the HWB was not aware that housing in the area was considerably advanced, and that, had they noted that in the PNA, then Delmergate could have applied under Identified Future Need (IFN). Any application under IFN should be refused for this reason.
 - 2.14.3 CRS provided no evidence to support their claims regarding significant detriment.

- 2.14.4 Rushport Advisory considered that CRS' claim that the application was flawed was contradictory. Rushport noted that Delmergate would respond to any 'evolving' local needs, e.g. longer opening hours.
- 2.14.5 Rushport Advisory's client had an excellent understanding of the local position in Ebbsfleet and was confident of meeting timescales allowed for opening. Ackers has submitted an application to relocate which has shorter timescales for opening, i.e. 6 months as opposed to one year under Regulation 18.
- 2.14.6 Ackers has submitted two applications for the area which significantly affects Delmergate's interests. Rushport Advisory asked that Delmergate is included as an interested party and is included in the notification process.
- 2.14.7 Rushport Advisory highlighted anomalies in the comments submitted by the HWB and considered that whoever wrote the response did not understand the regulations that apply to the drafting of the PNA. They were concerned that the 'Committee' appeared to be acting in support of one contractor over another and asked for the identity of the responder be made known, and what contact they have had with Ackers Chemists Ltd.
- 2.14.8 Rushport Advisory considered that all parties accept that a pharmacy is required at the Ebbsfleet development.

Consideration

- 2.15 The Committee considered whether or not to approve the application for a proposed new pharmacy and took into account the relevant Regulation(s) and a range of other factors including those set out in the Department of Health's publication "NHS Pharmaceutical Services: Assessing Applications" published in November 2013, providing guidance to NHS England.
- 2.16 The Committee had before it the application together with a map of the area showing existing pharmacies and doctors' surgeries and the site of the proposed pharmacy. It also had before it the responses to the notification exercise.
- 2.17 Members of the PSRC (TSSB & VSJ had also undertaken a site visit (Appendix 1). They noted that the area was non-controlled, therefore a rurality review was not required.
- 2.18 TSSB reported that currently approx. 984 houses have been completed. The current plans are scheduled for completion in 2021.

Regulations 36 & 37

- 2.19 The Committee then considered Regulation 36 and 37. The area had previously been determined as a non-controlled locality and, in the absence of any proposal from either the LPC or LMC that this classification should be changed, the Committee confirmed that it should remain a non-controlled locality within the meaning Regulations 36 of the 2013 Regulations.

Regulation 31

- 2.20 The Committee first had regard to Regulation 31 of the regulations [quoted in full]:
- 2.21 The Committee was of the view that the criteria of this regulation did not apply to the application.

- 2.22 According to Google maps, the nearest existing pharmacy to the proposed site is Lloyds Pharmacy. This is 1.3km away and the journey by car takes some 5 minutes, or 17 minutes to walk.
- 2.23 Based on the information before it, the Committee was not required to refuse the application under the provisions of Regulation 31.
- 2.24 The Committee noted that, if the application was granted, the successful applicant would – in due course – have to notify NHS England of the precise location of its premises (in accordance with paragraph 31 of Schedule 2). Such notification would be invalid (and the applicant would not be able to commence provision of services) if the location then provided (had it been known now) have led to the application being refused under Regulation 31.

Regulation 18

- 2.25 The Committee noted that this was an application for “unforeseen benefits” and therefore was to be considered under the provisions of Regulation 18 [quoted in full]:

Will approving the application(s) secure improvements or better access to pharmaceutical services? (Regulation 18(1)(a))

- 2.26 The Committee considered the provision of pharmaceutical services in the area of Ebbsfleet and noted that currently there are no pharmaceutical services located within the area nor any dispensing services.
- 2.27 The Committee therefore found that Regulation 18(1)(a) was satisfied in that it was required to determine whether it was satisfied that granting the application, or granting it in respect of only some of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB.

Were these improvements included in the PNA? (Regulation 18(1)(b))

- 2.28 The Committee having considered that Regulation 18(1)(a) was satisfied, went on to consider whether Regulation 18(1)(b) was satisfied i.e., whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the regulations.
- 2.29 Paragraph 4 of Schedule 1 requires the PNA to include: “a statement of the pharmaceutical services that the HWB had identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied (a) would if they were provided ... secure improvements or better access, to pharmaceutical services ...(b) would if in specified future circumstances they were provided ... secure future improvements or better access to pharmaceutical services ...”
- 2.30 The Committee considered the PNA prepared by Kent Dartford, Gravesham and Swanley CCG published March 2018, and was conscious of the fact that this document provides an analysis of the situation as it was assessed at the date of its publication. However, the Committee was also mindful of the obligations under Regulation 6(2) on the body responsible for the PNA to make a revised assessment as soon as reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under Regulation 6(3). Such a statement then forms part of the PNA.
- 2.31 The summary of pharmacy provision in Kent PNA 2015, p24 states:

'There are proposed major housing developments across Kent, the main ones being Chilmington Green near Ashford and Ebbsfleet Garden City. This will mean that these areas will need to be reviewed on a regular basis to identify any increases in pharmaceutical need.'

- 2.32 The summary of pharmacy provision in Kent PNA - Dartford, Gravesham and Swanley CCG PNA 2018, p17 states:

'Conclusion

Monday to Friday

There is good provision of full pharmaceutical services in and around Dartford, Gravesham and Swanley as well in most of the villages such as West Kingsdown, Higham, New Ash Green, Longfield, Meopham and Vigo. Most of the smaller villages in the area such as Farningham and Eynsford have access to pharmaceutical services through their dispensing surgery.

Saturdays

There is good provision of pharmaceutical services on Saturdays in and around Dartford, Gravesham and Swanley as well in most of the villages such as West Kingsdown, Higham, New Ash Green, Longfield, Meopham and Vigo.

Sundays

There is good provision of full pharmaceutical services in and around Dartford, Gravesham and Swanley on a Sunday.

Therefore pharmaceutical services are mainly good across the area and we do not need any more providers in the area except

1) A need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services.'

- 2.33 The Committee noted that Rushport Advisory, acting on behalf of the applicant, was of the view that Regulation 18 was the appropriate Regulation under which to apply. One of the comments received from the notification exercise (Charles Russell Speechlys (CRS)) was of the view that Regulation 15, which identifies future needs, was the relevant Regulation to apply. The Committee noted the disagreement amongst the parties on interpretation of the relevant regulations.
- 2.34 The Committee, after some discussion, was of the view that Regulation 18 was not the appropriate regulation under which to apply, due to the references made to the possible future need in both the 2015 and 2018 PNAs to the Ebbsfleet development.
- 2.35 Based on the information provided the Committee noted that the improvements or better access that the Applicant was claiming would be secured by its application were included in the relevant PNA in accordance with paragraph 4 of schedule 1.
- 2.36 In order to be satisfied in accordance with regulation 18(1), the Committee had to have regards to those matters set out in Regulation 18(2). The Committee's consideration of the issues is set out below:

Would granting the application cause significant detriment to the proper planning of the provision of pharmaceutical services in the HWB's area? (Regulation 18(2)(a)(i))

- 2.37 The Committee had no information to demonstrate that the planning of the provision of pharmaceutical services would be significantly affected by the opening of a further pharmacy as there were already a number of different providers offering a range of opening hours.
- 2.38 The Committee was of the view that a granting of the application would not cause significant detriment to the proper planning of the provision of pharmaceutical services in the HWB's area.

Would granting the application cause significant detriment to the arrangements for the provision of pharmaceutical services in the area? (Regulation 18(2)(a)(ii))

- 2.39 The Committee had no information to demonstrate that a granting of the application would cause significant detriment to the arrangements for the provision of pharmaceutical services in the HWB area as a number of providers are already providing services within the area, although the Committee was mindful of the statement in the PNA that existing providers should be invited to provide services in areas such as Ebbsfleet when the identified future needs have materialised rather than allowing new providers to provide services.
- 2.40 The Committee was of the view that a granting of the application would not cause significant detriment to the arrangements for the provision of pharmaceutical services in the HWB's area but was mindful of the wording in the PNA about existing providers.
- 2.41 In the absence of any significant detriments as described in Regulations 18(2)(a), the Committee was not obliged to refuse the application and went on to consider Regulation 18(2)(b).

Regulation 18(2)(b) confers significant benefits

- 2.42 The Committee had regards to [Regulation 18(b)(2) quoted in full]

Reasonable choice (Regulation 18(2)(b)(i))

- 2.43 The Committee noted that currently there is no pharmacy located within the immediate area of the application and there is no dispensing practice. However, the question of choice relates to choice with regards to obtaining pharmaceutical services in the area of the relevant HWB. The Committee therefore examined the choices currently available to patients within a reasonable travel distance of the best estimate location.
- 2.44 The nearest pharmacy to the proposed site would appear to be Swan Valley Pharmacy (1.2km distant), which is open for 47.5 hours per week (40 hours core) (no weekend opening). Ackers Pharmacy (1.6km distant), is open for 44 hours per week (40 hours core), including 4 hours on Saturday. The next nearest two pharmacies are 3.3km distant.
- 2.45 The nearest GP practice to the proposed site is Swanscombe Health Centre.
- 2.46 The applicant proposed to provide pharmaceutical services for 51 core hours a week, the pattern of which was as follows:-

Monday to Friday: 09:00-17:30
 Saturdays: 09:00-17:30
 Sundays: Closed

- 2.47 The Committee noted that within the Greenhithe ward a relatively high number of residents felt that their health was good or very good. Households with 2+ car/vans was reasonably high as well.

2.47.1 Population data (from the Office for National Statistics)

Greenhithe/Dartford	Ward Figures	Middle Lower SOA
Total population	6,567	97,365
% Population who say they have good or very good	86.9%	83.5%

health		
Households with 2+ cares/vans	32.8%	35.4%

2.48 The Committee was also aware that no complaints had been received about the current level of pharmaceutical services provided.

2.49 Therefore when considering the criteria for reasonable choice in relation to physical access, and the size of the population, the services provided by the existing range of providers within reasonable distance to Ebbsfleet as well as the GP Service provision providing services to that area, the Committee was of the view that there was already reasonable choice with regards to obtaining pharmaceutical services in the area of the relevant HWB.

2.50 The Committee therefore found that granting the application, would not confer significant benefits on persons in the area.

Difficulty of access (protected characteristics (Regulation 18(2)(b)(ii))

2.51 In considering Regulation 18(2)(b)(ii) the Committee was aware that it was required to focus on people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access. The Committee was also aware of its obligations under the Equality Act 2010 which include considering the elimination of discrimination and advancement of equality between patients who share protected characteristics and those without such characteristics.

2.52 The applicant stated:

‘In addition to providing dispensing services, the pharmacy would provide all other essential, advanced and enhanced services that are commissioned by NHS England and the local authority. Providing access to these services will be of significant benefit for patients, particularly those who have difficulty accessing other areas, such as the infirm, disabled, or parents with young children (i.e., those who share a protected characteristic).’

2.53 However, the Applicant has not presented any evidence to indicate that there were any persons with protected characteristics who are currently experiencing any difficulty accessing services. If there was a requirement in the area for particular services to address difficulties in accessing services that meet the specific needs of people with protected characteristics, either NHS England or the local Clinical Commissioning Group could commission such a service.

2.54 The Committee was therefore not satisfied that, having regards to the specific needs of those with protected characteristics in the area, that granting the application would confer significant benefits on persons.

Providing an innovative approach to the delivery of pharmaceutical services (Regulation 18(2)(b)(iii))

2.55 In considering Regulation 18(2)(b)(iii) the Committee considered the desirability of innovative approaches to the delivery of pharmaceutical services. In doing so, the Committee was expecting provision of services that were ‘over and above’ the standard delivery and range of pharmaceutical services that might be expected from all pharmacies under the NHS contract i.e., essential, advanced and enhanced services.

2.56 The applicant states that they would provide the following services:

- 2.56.1 NMS, MUR, smoking cessation, EHC, flu vaccinations, chlamydia, other screening, PGD services, palliative care, needle & syringe exchange, supervised consumption, gluten-free foods
- 2.57 The Committee did not consider these to be innovative, either in type or method of delivery as envisaged by the Regulations.
- 2.58 The Committee agreed that there are no innovative approaches to the delivery of pharmaceutical services in the application.

Regulation 18(2)(b) generally

- 2.59 Having examined the application against the requirements of Regulation 18(2)(b) the Committee was of the view that in accordance with the regulation the granting of this application would not confer significant benefits on persons in the area of the HWB which were not foreseen when the PNA was published

Other considerations

- 2.60 Having determined that Regulation 18(2)(b) had not been satisfied, the Committee did not need to have regards to regulation 18(2)(c) – (e).
- 2.61 No deferral or refusal under Regulation 18(2)(f) was required in this case.

Regulation 19

- 2.62 The Committee then considered Regulation 19 [quoted in full]:
- 2.63 The Committee considered the additional matters set out in Regulation 19 and decided that it did not wish to defer the application for grounds set out in Regulation 19. It felt that the application was not meeting the criteria for offering improvements or better access not foreseen in the PNA as required by Regulations 18 (2)(b) and therefore it would not grant the application under Regulation 19(6).

Deliberation

- 2.64 The Committee considered the information presented by the Applicant and the relevant parties, the current service provision in the area, the very recent Kent Pharmaceutical Needs Assessment, as well as the size, health and mobility of the local population.

Decision

- 2.65 The Committee carefully examined the various factors against which applications made under Regulation 18 must be determined. It concluded that the location was not in a controlled locality and that the best estimate for the premises was not in a reserved location.
- 2.66 The Kent (DGS CCG) PNA on p. 17 concludes that there is
“1) A need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services.”
- 2.67 It was deemed that the need for pharmaceutical services in the area of Ebbsfleet had not, as yet materialised as insufficient building work had been completed, nor had the population increased yet to such a degree that pharmaceutical services in Ebbsfleet were required at the moment.

- 2.68 The Committee concluded that granting the application would not prejudice the proper provision of relevant NHS Services in the area of (a) the relevant HWB or (b) a neighbouring HWB of the relevant HWB.
- 2.69 The Committee considered whether the granting of the application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area covered by the HWB, or the arrangements in place for the provision of pharmaceutical services in that area and is satisfied that it would not.
- 2.70 The Committee determined that the application should be refused on the following basis:
- 2.70.1 The application was incorrectly submitted under Regulation 18;
- 2.70.2 In considering whether granting of the application would confer significant benefits, the Committee determined that – there is already a reasonable choice with regards to obtaining pharmaceutical services within the relevant HWB area;
- 2.70.3 There is no evidence of people sharing a protected characteristic having difficulties in accessing pharmaceutical services; and
- 2.70.4 There is no evidence that innovative approaches would be taken with regards to the delivery of pharmaceutical services;
- 2.71 In conclusion, the Committee was not satisfied that granting the application would confer significant benefits as outlined above that would secure improvements or better access to pharmaceutical services.
- 2.72 The Application was refused.
- 2.73 Notification Exercise
- 2.74 The statutory notification exercise was carried out by Primary Care Support England and comments were received from the parties below. It was decided that the right of appeal should be given to parties indicated:

Ackers Ltd	Yes
Kent LPC	No
Kent HWB	No

- 2.75 There being no other business the Chairman closed the meeting.
- 2.76 Minutes agreed as correct:

3 The Appeal

In a letter dated 5 October 2018 addressed to NHS Resolution, Rushport Advisory LLP on behalf of the Applicant appealed against NHS England's decision. The grounds of appeal are:

- 3.1 The basis of the appeal is set out in the attached “Pharmacy Report” (see appendix A). The report has been compiled by an expert in planning matters (Mr Eamonn Loughrey of Inaltus) with input from Rushport Advisory LLP.
- 3.2 The report deals with the true position in relation to the Ebbsfleet development, which is one of the largest ongoing developments in the U.K.

- 3.2.1 Section 3 discusses the Ebbsfleet Garden City;
 - 3.2.2 Section 4 discusses the PNA;
 - 3.2.3 Section 5 considers Healthcare Provision in the Area;
 - 3.2.4 Section 6 deals with Regulation 18 Compliance ; and
 - 3.2.5 Section 7 sets out the Conclusions.
- 3.3 The Committee will note that NHS England accepts that there is no provider of pharmaceutical services in the area, but still finds that granting the application would not secure either improvements or better access to pharmaceutical services. The Applicant rejects the approach adopted by NHS England and their reasoning for the reasons set out in the report.
 - 3.4 The Committee will note that section 5 of the report clearly sets out why existing contractors in other areas cannot be considered to provide pharmaceutical services to the new Ebbsfleet development and provides clear rationale for making this submission.
 - 3.5 The Committee is also asked to note that the report deals properly with why this application was correctly submitted under regulation 18 (contrary to NHS England's views).
 - 3.6 Finally, the Committee may wish to note that another contractor, Ackers Chemists Limited, has submitted two applications in order to attempt to open a new pharmacy at the Ebbsfleet development, one is a relocation (of over 1 mile from an entirely different area) which is yet to be circulated by NHS England and the other is an application under regulation 15 for an identified need (which the Applicant says is not properly identified in the PNA). Whilst both of these applications and the Applicant's application will fall to be considered under different regulatory tests which are not dependent upon one another, the Committee may see some benefit in considering them together to avoid undue repetition of work.

4 **Summary of Representations**

This is a summary of representations received on the appeal.

4.1 **NHS ENGLAND**

- 4.1.1 For ease of reading, the response from NHS England will address the issues in the same order as that used by the Appellant in the letter of appeal dated 5th October 2018, and specifically the attached "Pharmacy Report" of June 2018.

"NHS England then errs in its decision making by incorrectly asking the question 'Were these improvements included in the PNA? (Regulation 18(1)(b))'.

- 4.1.2 NHS England then quotes paragraph 4, schedule 1 of the Regulations, but then fails to apply it in its decision making process and instead finds that 'Regulation 18 was not the appropriate regulation under which to apply, due to the references made to the possible future need in both the 2015 and 2018 PNAs to the Ebbsfleet development". (Pharmacy Report p. 42 para 7.44)
- 4.1.3 NHS England wishes to refute the assertion that in refusing this application it was failing to apply paragraph 4 Schedule 1 of the Regulation.

- 4.1.4 The content of PNAs is set out in Schedule 1 to the NHS (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013. The PNA must contain:

Regulation 4(1)

SCHEDULE 1 Information to be contained in pharmaceutical needs assessments

Necessary services: current provision

1. A statement of the pharmaceutical services that the HWB has identified as services that are provided (a) in the area of the HWB and which are necessary to meet the need for pharmaceutical services in its area; and (b) outside the area of the HWB but which nevertheless contribute towards meeting the need for pharmaceutical services in its area (if the HWB has identified such services).

Necessary services: gaps in provision

2. A statement of the pharmaceutical services that the HWB has identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied- (a) need to be provided (whether or not they are located in the area of the HWB) in order to meet a current need for pharmaceutical services, or pharmaceutical services of a specified type, in its area:

(b) will, in specified future circumstances, need to be provided (whether or not they are located in the area of the HWB) in order to meet a future need for pharmaceutical services, or pharmaceutical services of a specified type, in its area (emphasis added)

Improvements and better access: gaps in provision

4. A statement of the pharmaceutical services that the HWB has identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied - and would, if they were provided (whether or not they were located in the area of the HWB), secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in its area,

(b) would, if in specified future circumstances they were provided (whether or not they were located in the area of the HWB), secure future improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in its area (emphasis added)

<https://www.legislation.gov.uk/uksi/2013/349/schedule/1/made>

- 4.1.5 From the wording of Regulation 4 Schedule 1 it is clear that the relevant HWB in its PNA(s) should be providing an identification of necessary services or improvement and better access: gaps in provision. It is also clear that the PNA should cover not only the need for necessary services and improvement and better access at the time of issuing the PNA but should also identify these if they, in specified future circumstances, would, if provided, meet a future need or secure improvement or better access to pharmaceutical services in its area.

- 4.1.6 With regard to pharmaceutical services identified in the PNAs covering the Ebbsfleet Garden City, statements have repeatedly been issued concerning the identification of future needs. However, the PNAs also clearly indicate that these needs have not yet materialised to such an extent that suggests that there are currently any unmet needs in the HWB.

4.1.7 The Kent PNA 2015 p. 24 stated

'There are proposed **major housing developments** across Kent, the main ones being Chilmington Green near Ashford and **Ebbsfleet Garden City**. **This will mean that these areas will need to be reviewed on a regular basis to identify any increases in pharmaceutical need.**' (Emphasis added)

4.1.8 The Kent PNA 2018 states on p. 5 that

'Overall there is good pharmaceutical service

5. There are proposed major housing developments across Kent, **the main one** being Ebbsfleet Garden City and Chilmington Green. This will mean that these areas will **need to be reviewed on a regular basis to identify any increases in pharmaceutical need**. Locality specific areas are listed within the locality documents...' (Emphasis added)

4.1.9 The Kent PNA - Dartford, Gravesham and Swanley CCG PNA 2018. p15 states:

'Ebbsfleet Garden City A major housing development was identified in 2015 for the Ebbsfleet area. to be known as Ebbsfleet Garden City, with up to 15.000 homes initially. **It was highlighted in the 2015 PNA as possibly needing extra pharmaceutical services in the future**. This area is marked on a map in Appendix A and the development lies across the Dartford/Gravesham Council boundaries. Although building has been slow to happen. it has been estimated that nearly 750 units will be ready for occupation in the area by 2018. **This means that it has now been identified that there may be need for pharmaceutical services in the area within the life of this PNA dependent on the capacity of the surrounding pharmacies**. There are already over 40 pharmacies servicing the population of Dartford and Gravesham and it may be more appropriate to invite relocation of one or more of these pharmacies into the Ebbsfleet area rather than open yet another contract.' (Emphasis added)

4.1.10 The Appellant is arguing that NHS England and others (Page 20 para 5.0 - 5.10) are wrongly interpreting the Regulation. The Appellant's view is that despite the explicit mentioning of the Ebbsfleet Housing Development in the PNAs. quoted above, its application under Regulation 18 'Unforeseen Benefits' is correct as a PNA '**...cannot simply note a housing ... is planned and/or note that a pharmacy may be required in the future and then use these references to refuse all application types**' (p. 20 - 21 para 5.5). (Emphasis added)

4.1.11 The main aim of a PNA is to assess and describe the current pharmaceutical services in the area of an HWB and systematically identify any gaps/unmet needs and in consultation with stakeholders *make recommendations on future development*.

4.1.12 The PNA is a key document used by the local area Pharmaceutical Services Regulations Committee (PSRC) to make decisions on new applications for pharmacies and change of services or relocations by current pharmacies. It is also used by commissioners reviewing the health needs for services within their particular area, to identify if any of their services can be commissioned through pharmacies.

4.1.13 As such, a PNA is not only giving a picture of the status quo in an area but is also providing a strategic analysis of areas for possible future needs both short-term and long-term in order for statutory agencies to use this

information to plan for future service provisions. As with any strategic analysis some issues will be needing to be 'flagged up' and closely monitored for potential impact before they become realities, as without their early identification local strategic planning for future service provisions could be adversely impacted.

- 4.1.14 Whilst the different PNAs state that this area of Kent is subject to development in the future, the developments were not identified as requiring a need for further pharmaceutical services in the area at the moment. Had such a need been identified following the publication of the 2015 or 2018 PNAs, a revised PNA or a supplementary statement should have been issued and no such documents have been issued relating to this development since April 2018.
- 4.1.15 With regard to the Ebbsfleet housing development, it is clear from the PNAs that the housing development has been slow and that the figures given by the Appellant (pharmacy report p. 6-18) is an illustration of what the future in Ebbsfleet might look like assuming all the planned building developments do come to fruition within the original anticipated timeline.
- 4.1.16 NHS England, in considering an application for inclusion in a pharmaceutical list will have to consider the application within the context of the situation as it exists at the time of the decision rather than how it might be in an uncertain future where the economic situation of the area and the country might change in unpredictable ways.
- 4.1.17 At the moment, the number of completed houses is 1,174 (Ebbsfleet - track our performance) which does not equate to houses being sold and inhabited. This is clear from the web site from the developers that illustrates the number of houses for sale. Taylor Wimpey website
- 4.1.18 It is, therefore, the view of NHS England that it has been correct in the way it has applied the Regulation to the application by the Appellant.
2. "It is also important to note that the PNA wrongly assumes a number of facts" (pharmacy report p. 22 para 5.11)
- 4.1.19 NHS England would disagree with the Appellant's statement about the April 2018 Kent PNA being based on incorrect information.
- 4.1.20 Every Health and Wellbeing Board (HWB) in England has a statutory responsibility to publish and keep up-to-date, a statement of the need for pharmaceutical services in its area, otherwise referred to as a Pharmaceutical Needs Assessment (PNA).
- 4.1.21 The process of compiling and consulting on the PNA is both inclusive and very comprehensive and is focussed on ensuring accuracy, An outline of the process undertaken before the final PNA was published is described in the Kent 2018 PNA p.3-6.

The PNA for Dartford, Gravesham and Swanley CCG 2018 states:

"Housing: like most of Kent, considerable new housing is expected to be built in the Dartford, Gravesham and Swanley area over the next 20 years. The planning departments at Dartford Borough Council, Gravesham Borough Council and Sevenoaks District Council were consulted to identify any new developments that have or are due to be built since the 2015." PNA p.15

"All areas will be reviewed regularly especially if the house building changes the landscape from rural to urban or progresses at a faster rate," P. 15

4.1.22 The PNA further states it is monitoring housing developments and all associated increase in population, mindful of the implication that any such demographic change may affect the need for additional or relocated pharmaceutical provision,

3. "NHSE then goes on to again note that there are no pharmacies or dispensing doctors in the area, but still believes that patients have a reasonable choice of service providers due to their perceived good health and access to vehicles. This finding simply chooses to ignore all those who are:

- a. In good health but requires access to a pharmacy to pick up medicine they take
- b. In any sort of health but need advice on self-care or access to any of the services that a pharmacy can provide
- c. In poor health (NHSE does not explain why it has ignored the need of those who would most require pharmaceutical services)
- d. In any sort of health but do not have access to a car" (Pharmacy Report p.43 para 7.47

4.1.23 The Appellant in the statement above indicates that NHS England in reaching its decision to refuse the application ignored the matter of access to pharmaceutical services in the area.

4.1.24 NHS England would wish to refute this. Access to pharmaceutical services is one of the key criterion which was carefully considered by NHS England as part of its deliberations.

4.1.25 NHS England noted that currently there was no pharmacy located within the immediate area of the application and there was no dispensing practice. However, the question of choice relates to choice with regard to obtaining pharmaceutical services in the area of the relevant HWB. NHS England therefore examined the choices currently available to patients within a reasonable travel distance of the best estimate location.

4.1.26 The nearest pharmacy to the proposed site was Swan Valley Pharmacy (1.2km distant), which is open for 47.5 hours per week (40 hours core) (no weekend opening). Ackers Pharmacy (1.6km distant), is open for 44 hours per week (40 hours core), including 4 hours on Saturday. The next nearest two pharmacies are 3.3km distant.

4.1.27 The nearest GP practice to the proposed site is Swanscombe Health Centre. This practice is in the same proximity as the Swan Valley Pharmacy.

4.1.28 NHS England had noted that within the Greenhithe ward a relatively high number of residents felt that their health was good or very good. Households with 2+ car/vans were reasonable high as well and 86% have access to at least 1 vehicle.

Greenhithe/Dartford	Ward Figures	Middle Lower SOA
Total population	6,567	97,365
% Population who say they have good or very good health	86.9%	83.5%
Households with 2+ cars/vans	32.8%	35.4%

4.1.29 It was also noted that the ratio of number of pharmaceutical service (community Pharmacies and GP dispensing practices) providers per 100,000

population in the area of the Dartford, Gravesham and Swanley GGG is slightly above the Kent average.

Locality	Number of providers	Practice Population	Ration/100,000 population
NHS DGS CCG	60	266,075	22
Ken			21
England			23

4.1.30 The PNA for DGS CCG clearly sets out that although increases in population are expected across all age bands in Dartford, Gravesham and Swanley GGG according to Office for National Statistics population projections, the largest increase is anticipated in the 85 and above age band, an increase of 22.7%, representing 1,325 additional individuals of that age group between 2015 and 2020.

4.1.31 The PNA also states that:

"Research has shown that in general, and during a lifetime, children and older people consume more medicines and that generally women, over their lifetime, consume more medicines than men. Therefore, it is suggested that areas where there are a higher number than average of children 0-9 and elderly people over 65 living alone, especially female, will have need to access pharmaceutical services more often. However, this need does not necessarily equate to needing more pharmacy premises as pharmacies are not restricted by list size and can readjust both staffing levels and premises size to manage the increased volume. It is widely thought that people being cared for in care homes (residential or nursing) access NHS services more frequently but that is not always the case in the access of pharmaceutical services. The nature of the care given in care homes means that medicines are ordered and supplied by the care home and patients rarely need to access a pharmacy individually. Most care homes now have external contracts with medicines suppliers which are not necessarily local and therefore there is no relationship between the number of care homes and the need for local pharmaceutical services." P. 10- 11 (Emphasis added)

"Pharmaceutical Services in the area.

There are two ways that patients can access pharmaceutical services within the Dartford, Gravesham and Swanley CCG area. They are through community pharmacies or through a dispensary within a GP practice (Dispensing practices)

Appliances can be obtained through both of these methods or through a specific appliance contractor. Appliance contractors usually provide a service nationally and there are two based in the Kent area. **Patients can also request to have their prescriptions (especially repeat prescriptions) sent electronically (EPS) to a pharmacy of their choice, such as one close to their work place or near their home. This means that positioning a pharmacy next to a GP practice is no longer as important.**" P 8 - 9 (Emphasis added)

- 4.1.32 The general access to pharmaceutical services in the area is illustrated in the summary of pharmacy provision in Kent PNA - Dartford, Gravesham and Swanley CCG PNA 2018, p17 which states:

"Conclusion Monday to Friday

There is good provision of full pharmaceutical services in and around Dartford, Gravesham and Swanley as well in most of the villages such as West Kingsdown, Higham, New Ash Green, Longfield, Meopham and Vigo. Most of the smaller villages in the area such as Farningham and Eynsford have access to pharmaceutical services through their dispensing surgery.

Saturdays

There is good provision of pharmaceutical services on Saturdays in and around Dartford, Gravesham and Swanley as well in most of the villages such as West Kingsdown, Higham, New Ash Green, Longfield, Meopham and Vigo

Sundays

There is good provision of full pharmaceutical services in and around Dartford, Gravesham and Swanley on a Sunday.

Therefore, pharmaceutical services are mainly good across the area and we do not need any more providers in the area except

1) A need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services." (Local Emphasis)

- 4.1.33 The access to pharmacies, with respect to their actual distance within the area is illustrated in the Kent Public Health Observatory. The Pharmaceutical Needs Assessment - NHS Dartford, Gravesham and Swanley CCG Supplementary data and maps data correct as of March 2018.

- 4.1.34 https://www.kpho.org.uk/_data/assets/pdf_file/0007/76759/NHS-DGS-CCG-Appendix-A.pdf

- 4.1.35 The access to existing pharmacies as can be seen on the map (appendix B), is not different from access to pharmacies in most other parts of Kent.

"Access The 2008 White Paper 'Pharmacy in England: Building on strengths delivering the future' 2 states that it is a strength of the current system that community pharmacies are easily accessible, and that 99% of the population –even those living in the most deprived areas - can get to a pharmacy within 20 minutes by car and 96% by walking or using public transport. Moreover, recent research carried out by Durham University (published in BMJ Open online on 12th August 2014 <http://bmjopen.bmj.com/content/4/8/e005764.full>) suggests that 99.8% of the people in deprived areas can walk to a pharmacy within 20 minutes (1 mile/1.6km). Using simple "as the crow flies" parameters of one and five miles to represent the distance walked and driven respectively within 20 minutes, the majority of Kent residents are able to access a provider of pharmaceutical services (either community pharmacy or dispensing practice) within 20 minutes. Also, the majority of the residents living within the deprived areas of Kent, which may mean that there is not access to a car, are also able to access pharmaceutical services within 1 mile (1.6km) of their residence. "p. 11

- 4.1.36 The opening hours of existing pharmacies in the area is also provided in the Dartford, Gravesham and Swanley GGG PNA 2018.

"Opening times A review of all opening times was carried out in October 2017 using data provided by NHS England, which is available on NHS Choices. It was considered that there is good provision of pharmaceutical services through pharmacies and dispensing surgeries for the majority of the day between 8am and 6.30pm on Monday – Friday across the area

Swanley - 7 pharmacies in total Services before 8 am (2 pharmacies) and after 6.30pm (4 pharmacies) are provided in the Swanley area. All 7 pharmacies are open Saturday mornings and 5 pharmacies also provide services on Saturday afternoons. 2 pharmacies also provide services on Sundays. P. 11 Pharmaceutical services out of hours: The Dartford, Gravesham and Swanley CCG area currently has five 100-hour pharmacies, two in Swanley, 2 in Gravesham and one in Dartford. These provide access to pharmacy services from early in the morning until late at night Monday to Saturday and are often open on a Sunday." P 13

https://www.kpho.org.uk/_data/assets/pdf_file/0006/76758/Kent-PNA-2018-DGSArea.pdf

- 4.1.37 NHS England in reaching its decision on the application also had to examine multiple factors indicating the needs for pharmaceutical services of the reliant population. The most detailed Multiple Deprivation information for the Swanscombe area can be seen from the latest Index figures below (Table 1)
- 4.1.38 <https://www.uklocalarea.com/index.php?q=Swanscombe&wc=29UDGP>
- 4.1.39 Life expectancy at birth <http://atlas.kpho.org.uk/single-map/atlas.html>
- 4.1.40 Living Well DGS CCG https://www.kpho.org.uk/_data/assets/pdf_file/0020/45317/Living-Well-DGSCCG.pdf
- 4.1.41 These critical factors show that the area had an average more or less the same as the Kent average on most criteria.
- 4.1.42 It is also apparent from the interactive map (at appendix B) that the Castle Hill area of the Ebbsfleet Development does not fall into the most deprived area of Swanscombe.
- 4.1.43 In the appeal the Appellant make references to how the application would meet the need of people with a protected characteristic and make reference to new parents with young children (pharmacy report p. 41-42 para 7.39 - 7.40). However, NHS England was provided with no information to show that these persons or any others with a protected characteristic, are having difficulty accessing services that meet specific needs for pharmaceutical services. NHS England was, therefore, not satisfied that, having regard to the desirability of people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services, that the current services are difficult for them to access, and that granting the application would confer significant benefits on such persons.

Innovation

- 4.1.44 NHS England also noted that the Appellant had not claimed that its proposed services would be innovative and was not satisfied that, having regard to the desirability of there being innovative approaches taken with regard to the deliverability of pharmaceutical services, granting the application would confer significant benefits on persons

Overall

- 4.1.45 NHS England was of the view that there was no evidence provided to suggest that the population in the area of the application currently have not a reasonable choice and access to pharmaceutical services. Therefore, it was not satisfied that granting the application would confer significant benefits on persons. It was also mindful that where it considers there is a need to do so,

NHS England already has the power to bring about changes to the opening hours of existing pharmacies in the area.

- 4.1.46 In considering an application for unforeseen benefit NHS England must assess the application against the various requirements set out in Regulation 18. Firstly, Regulation 18(1)(a) needs to be satisfied in that NHS England is required to determine whether it was satisfied that granting the application or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB. Having been satisfied that this was the case, NHS England also had to be satisfied that the application meets the other criteria as set out in Regulation 18(1)(b) and Regulation 18(2).
- 4.1.47 In assessing the application against the other criteria in Regulation 18, NHS England's decision letter explicitly set out the reasons why these criteria were not met.
- 4.1.48 NHS England, when considering the criteria for reasonable choice, took into account a range of data relating to the physical access, terrain, barriers, the health, size, and demography of the population, and the car ownership profile. In addition, NHS England assessed the services provided by the existing range of pharmaceutical service providers and their opening hours; as well as the pharmacies' locations and the nature of the journeys (time and distance) required to reach them. Deliberating on all this, NHS England reached the decision that there was already a reasonable choice with regards to obtaining pharmaceutical services in the area of the relevant HWB.
- 4.1.49 Also, of relevance to the consideration of physical access is the information about public transport where the PNA states:
- 4.1.50 Public transport links are good especially if you are close to the main towns, near to the main roads or near the railway lines. Community Transport services are available to residents who are unable to access public transport easily p. 10
- 4.1.51 Furthermore, NHS England was not aware that any complaints have been received about the current level of services provided.

Conclusion

- 4.1.52 Firstly, NHS England would like to state its view that the application made by the Appellant was for needs that were already both foreseen and explicitly identified in the relevant PNAs that were published 6 months previously and as such were not for 'unforeseen benefits'.
- 4.1.53 Moreover, the PNAs, in addressing this foreseen, but not yet imminent need, set up a watching brief to track the pace and extent of the planned development; and hence to anticipate if, or when, any change to the current pharmaceutical services provision in the HWB may in fact be required.
- 4.1.54 However, in reaching its decision to refuse the Appellant's application under regulation 18, NHS England also carefully considered the relevant and very recent Kent Pharmaceutical Needs Assessment and the Dartford, Gravesham and Swanley CCG supporting PNA, conscious that the documents provide an analysis of the situation as it was assessed at the date of publication (April 2018) and other supporting documents. NHS England was mindful of the fact that, under Regulation 6(2) of the NHS (Pharmaceutical Services) Regulations ("the 2012 Regulations"), the body responsible for the PNA must make a revised assessment as soon as

reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under regulation 6(3).

- 4.1.55 Such a statement then forms part of the PNA. Although two Supplementary statements have been issued following the publication of the PNA none of these refers to matters relevant to the application for a new pharmacy made under Regulation 18 in the Castle Hill Village area of Ebbsfleet.
- 4.1.56 NHS England is aware that the recent Kent PNA and its supporting documents do not consider that there are any gaps at the moment in the provision of pharmaceutical services in the area of the proposed site for the Appellant's pharmacy application, however it is also aware that the proposed area of Ebbsfleet is identified as an area where future needs for pharmaceutical services might arise within the lifetime of the current PNA.
- 4.1.57 NHS England is also aware that the conclusions and recommendations Kent PNA 2018 DGS area clearly states that:

"Any application must demonstrate that it can improve on the availability of services across the specific area without destabilising the current provision. It is recommended that if a need is identified, whether foreseen or unforeseen, that the current providers are approached to establish whether they can meet the need, before a completely new contract is considered. Permission for any applicant to provide extra pharmaceutical services to this area must be carefully considered as to whether it will destabilise the current providers, resulting in closures and less pharmaceutical services being available at crucial times." P.18

https://www.kpho.org.uk/_data/assets/pdf_file/0006/76758/Kent-PNA-2018-DGSArea.pdf

- 4.1.58 NHS England is also of the view that no information was provided by the Appellant to demonstrate that there is significant difficulty for people who share a protected characteristic or anyone else in accessing current pharmaceutical services or that a pharmacy at the proposed site would improve access significantly for residents in the area of the relevant HWB.
- 4.1.59 NHS England acknowledges, however, that with an application for a new pharmacy some might find it convenient to have a local pharmacy, but this is not, in itself, a determining factor. NHS England is of the view that the area around the proposed site in Castle Hill Village is mainly a residential estate and that residents regularly have to travel out of the area for work and the majority of their day to day living requirements, including their nearest GP surgeries, secondary and higher education, and shopping facilities. Also, there is already a reasonable choice of providers of pharmaceutical services within a reasonable distance and, between them, they provide extended opening hours.
- 4.1.60 Therefore, NHS England considers that, to have a pharmacy in the proposed location in Castle Hill Village, will not result in a significant benefit being conferred with regards to choice or improvement in pharmaceutical services to persons in the relevant HWB area and is, therefore, of the view that the Appellant's application did not meet the criteria set out under Regulation 18.
- 4.1.61 NHS England wishes to maintain its view that the application should be refused.

4.2 LPC

- 4.2.1 From the correspondence, the LPC note that in addition to their comment in their response to the application (July 2nd, 2018) that, considering the current PNA comments on Ebbsfleet, strictly, this is not an unforeseen benefit, but the expansion of pharmaceutical services is supported; Charles Russell Speechlys and NHS England also concluded that this application was incorrectly submitted under regulation 18, unforeseen benefits.
- 4.2.2 The Health and Wellbeing Board supported the above stating that development in the area and future potential gaps in provision “were referenced in both the 2015 and 2018 PNAs for the area.”
- 4.2.3 Rushport Advisory responded to this stating that the meaning of regulation 18 had not been correctly interpreted and that improvements or better access that would be secured were or was not included in the relevant PNA.
- 4.2.4 Notwithstanding the above points, the LPC wish to re-state that the PNA also commented that “there are already 40 pharmacies servicing the population of Dartford and Gravesham and it may be more appropriate to invite relocation of one or more of these pharmacies into the Ebbsfleet area rather than opening yet another contract.”
- 4.2.5 The LPC have no further comments to make regarding this application and should an oral hearing be convened, the LPC wish to be kept informed about it in accordance with paragraph 8 of schedule 3 to the Regulations and any further developments in this matter.

In a letter to NHS England dated 2 July 2018, the LPC stated:

- 4.2.6 The LPC note that this application is submitted under Part 3 of the Pharmaceutical Services Regulations, Regulation 18, Unforeseen Benefits: additional matters to which the NHSCB must have regard as unforeseen benefits.

- 4.2.7 The March 2018 Kent Pharmacy Needs Assessment (PNA) in its Executive Summary, states that:

“There are proposed major housing developments across Kent, the main ones being Ebbsfleet Garden City and Chilmington Green. This will mean that these areas will need to be reviewed on a regular basis to identify any increases in pharmaceutical need. Locality specific areas are listed within the locality documents.”

- 4.2.8 The specific PNA for the Dartford Gravesham and Swanley area goes on to state:

“Ebbsfleet Garden City. A major housing development was identified in 2015 for the Ebbsfleet area, to be known as Ebbsfleet Garden City, with up to 15,000 homes initially. It was highlighted in the 2015 PNA as possibly needing extra pharmaceutical services in the future..... Although building has been slow to happen, it has been estimated that nearly 750 units will be ready for occupation in the area by 2018. This means that it has now been identified that there may be need for pharmaceutical services in the area within the life of this PNA dependent on the capacity of the surrounding pharmacies. There are already over 40 pharmacies servicing the population of Dartford and Gravesham and it may be more appropriate to invite relocation of one or more of these pharmacies into the Ebbsfleet area rather than open yet another contract.”

- 4.2.9 Therefore, strictly, this is not an unforeseen benefit, but the expansion of pharmaceutical services is supported.
- 4.2.10 The LPC have no further comments to make regarding this application and wish to be kept informed about further developments in this matter.

5 Observations

5.1 RUSHPORT ADVISORY LLP

5.1.1 As the Committee will be aware, the basis of the appeal was set out in the "Pharmacy Report" submitted as part of the appeal. The report was compiled by an expert in planning matters (Mr Eamonn Loughrey of Inaltus) with input from Rushport Advisory LLP.

5.1.2 The Applicant notes that the NHS Resolution Guidance Note for Parties Involved in Pharmacy Appeals states;

"Where a party has provided evidence of a relevant fact which has not been disputed, NHS Resolution will proceed on the basis of that fact also having been proven."

5.1.3 The appeal documents provided evidence on the many matters which has not been disputed. These include, but are not limited to;

5.1.3.1 The nature of Ebbsfleet Garden City (section 3 of Pharmacy Report and 3.19 to 3.30 in particular)

5.1.3.2 The size and scale of the development. (as above)

5.1.3.3 Local Shopping Provision and lack of any pharmaceutical services in Ebbsfleet Garden City. (section 3.31 of Pharmacy Report)

5.1.3.4 Access to existing pharmacies and the difficulties associated with access. (Sections 3.32 to 3.34 and)

5.1.3.5 Topography and geography of the area and the impact on access by foot (Pharmacy Report para 7.11 to 7.16)

5.1.3.6 Difficulties associated with using cars to access existing pharmacies (7.17 and 7.17 of Pharmacy Report)

5.1.3.7 The lack of any bus service to existing pharmacies except for a single service to Bluewater Shopping Centre which is several miles from the application site. (7.19 of Pharmacy Report) and this bus does not serve the Castle Hill Local Centre development.

5.1.3.8 Why nearby pharmacies will not meet the needs of Castle Hill and Eastern Quarry (para 7.30 of Pharmacy Report)

LPC

5.1.4 The Committee should be aware that one of the interested parties in this application also sits on the LPC Committee. It is important in such cases that the LPC ensures that it is perceived as acting impartially and that has not happened in this case.

5.1.5 The Applicant notes that information provided by Ackers Chemists (via Charles Russell Speechlys) in their initial objection to this application is

accepted by the LPC without question and relied upon in their comments, whereas information from the Applicant is rejected without explanation.

- 5.1.6 The Applicant does not accept the position of the LPC in relation to whether their application was properly submitted under regulation 18 for the reasons set out in the Pharmacy Report that was submitted as part of the appeal.

NHS England

- 5.1.7 The Applicant is disappointed that NHS England does not accept that they have erred in any way when it is plainly obvious that they have done so. As this appeal cures those errors the Applicant has restricted final comments to rebuttal of the points made by NHS England.
- 5.1.8 It is clear that NHS England has simply failed to understand that importance of any identified need (current or future) being included in the PNA in accordance with para 4 of Schedule 1 of the Regulations.
- 5.1.9 Contrary to the comments from NHS England, the Applicant is not saying that NHSE was “failing to apply para 4 Schedule 1 of the Regulation” [sic]. It is not for NHS England to “apply” para 4 of Schedule 1 of the regulations. Instead, NHS England was required to consider if the improvements or better access were included in the PNA in accordance with the regulations and they have simply failed to do so. Had they done so they would have concluded that this application has been correctly made under regulation 18.
- 5.1.10 NHS England then goes on to discuss the PNA at length even though this is irrelevant and fails to address the questions that have been asked of them in relation to para 4 of Schedule 1.
- 5.1.11 The Applicant notes that NHS England has used the Ebbsfleet Development Corporation “Track our Performance” link to say that there are now 1,282 homes completed. This is a substantial number and the pace of house completions is notable on the website, but it is unfortunate that the link does not say when this data is from other than a timeline showing 2018.

Access and Choice

- 5.1.12 NHS England provides its reasoning on the issues of Access and Choice from page 5 of their letter onwards and their explanation for their decision lacks credibility.
- 5.1.13 NHS England starts by stating that Swan Valley Pharmacy is located 1.2km from the application site (when it is in fact 1.4km away) and Ackers Chemist 1.6km from the application site (when it is in fact 1.7km distant). NHSE fails to consider the walk that would have to be undertaken to access either pharmacy, fails to consider the topography of the area and fails to consider that there is no public transport available to get to these pharmacies.
- 5.1.14 NHS England then completely ignores the facts as they relate to this case and goes back to quoting from the PNA at length and adds emphasis to sections of the PNA which have little or no relevance to this application.
- 5.1.15 Instead of considering the content of the Pharmacy Report and the facts as they relate to this application, NHS England instead quotes from the PNA and says;

“Also, of relevance to the consideration of physical access is the information about public transport where the PNA states:

Public transport links are good especially if you are close to the main towns, near to the main roads or near the railway lines. Community Transport services are available to residents who are unable to access public transport easily p. 10'

- 5.1.16 This is a very significant failing. NHS England has simply accepted that public transport links from the application site are good because of a generalised comment in the PNA that does not relate to the application area instead of considering the facts of the case. No such public transport links exists from the application site to any local pharmacy.
- 5.1.17 In an entirely counterintuitive way, NHS England adopts the findings of the PNA, even though the same PNA says that there will be a need for a pharmacy in Ebbsfleet at some unspecified point. In our submission that point is now as the retail development will be completed within 12 months. Typically a retail development only comes forward when there is sufficient demand for services.
- 5.1.18 NHS England then goes on to list other documents that it claims it had regard to in their decision making process even though they are listed here for the very first time and then states;
- “NHS England is of the view that the area around the proposed site in Castle Hill Village is mainly a residential estate and that residents regularly have to travel out of the area for work and the majority of their day to day living requirements, including their nearest GP surgeries, secondary and higher education, and shopping facilities.”
- 5.1.19 Not only is this statement factually incorrect, but it shows poor reasoning. No development is entirely self-contained and the test should be whether a development is “inward looking” – i.e. planners have determined that, due to its size and location, new shops, schools recreational areas, commercial developments etc. are required to serve the new population, or whether the new population is expected to use existing services in other locations.
- 5.1.20 The scale of the development proposed will mean high levels of people will not only live in the area, but that significant people will come into the area for shopping, work, business and to stay and relax.
- 5.1.21 Ebbsfleet Garden Village is a very large scale development. It is designed to be inward looking for services. Ebbsfleet is designated as a Garden City and is the first such major development in the United Kingdom (UK) since the early 20th Century. The aim of Ebbsfleet Garden City is to provide 15,000 new homes, with a population of 27,400 living in new neighbourhoods, 13 new primary schools, 8 secondary schools, 564,480 sq. m of commercial floor space, a new commercial centre providing up to 32,000 new local jobs for residents and 70,310 sq. m of retail floor space. It is a massive development and one of the largest developments in the UK. (Pharmacy Report para 3.5)
- 5.1.22 Castle Hill is the most notable development in Ebbsfleet Garden City. It is the largest area of development land and is the focus for the majority of housing. It is also the focus for most ongoing housing development at present. The infrastructure to the site has been developed and continues to expand. (Pharmacy Report para 3.19).
- 5.1.23 The Pharmacy Report goes to great lengths to show that the new development is inward looking for almost all services and will in fact bring people in to the area rather than seeing them leave it. People from other areas will be coming in to the development as part of their daily lives and

whilst NHSE claims this is important, they only consider its importance for people leaving rather than entering the development, thereby failing to have regard for a material fact.

5.1.24 We repeat part of the report below for reference (paragraph numbering differs from report numbering) that shows the scale of the development.

Table 3 Proposed Uses in Ebbsfleet Garden City

Area	Homes	Offices (Sq M)	Retail (Sq M)	Hotel (Sq M)	Leisure (Sq M)	Community (Sq M)
Eastern Quarry	6250	120,000	26,000	11,000	24,000	50,000
Ebbsfleet Green	950	1259		5000	1758	
Ebbsfleet Central	4000	455000	147000			21500
Northfleet Embankment West	782	16000	850	5000		1000
Northfleet Embankment East	700	87500				
Swanscombe Peninsula	210					

5.1.25 The scale of the development proposed will mean high levels of people will not only live in the area, but that significant people will come into the area for shopping, work, business and to stay and relax

5.1.26 In summary, this is an application where the evidence in support of granting the application is overwhelming and the application site forms part of one of the largest developments currently on site in the UK. Not only that, but the PNA recognises the scale of the development and that a pharmacy will be needed, but then fails to identify when that need will arise. The Health and Wellbeing Board has no current plans to review the PNA or Ebbsfleet even though the PNA on which NHS England relies so heavily states;

5.1.27 The area is changing rapidly and as well as consulting this PNA, the PSRC at NHS England should carry out a rapid review of any area where there is an application, to ensure that the needs of this area have not changed in the lifetime of the PNA. This could include review of rural and urban classification and should be published alongside the PNA in the supplementary statements.

5.1.28 No such “rapid review” has taken place since this application was submitted in February 2018 and none is planned. Indeed, the HWB web site shows that all meetings of the HWB since the publication of the PNA in March 2018 have been cancelled.

5.1.29 The Applicant asks that if the Committee has any doubt about the merits of this application that an oral hearing is convened so that the panel can see for themselves the scale of the development and how existing pharmacies in the wider area cannot hope to properly meet the needs of those who will be resident in or visiting the development.

5.2 CHARLES RUSSELL SOLICITORS ON BEHALF OF ACKERS CHEMIST LTD

5.2.1 As you are aware, Charles Russell Speechlys act for Ackers Chemists Limited trading as Swan Valley Pharmacy. Charles Russell Speechlys are in receipt of letters of 21 and 22 November 2018 from Primary Care Appeals.

Background

- 5.2.2 Ackers Chemists has made two applications for inclusion in the pharmaceutical list at the Castle Hill site. The first is an application under Regulation 15 offering to meet an identified future need at the Castle Hill Local centre.
- 5.2.3 Charles Russell Speechlys have indicated to NHS England that this is an application for a relocation under regulation 12(b)(ii) and not an application under regulation 12(b)(ii) to open new premises. The hours that are offered link in with Swan Valley Pharmacy so there is late night opening on Monday and Thursday until 8pm and Saturday and Sunday opening. We are awaiting the NHS England determination in relation to this application. Secondly, Ackers Chemist has made an application under Regulation 24 to relocate Ackers Chemist from Swanscombe to the Castle Hill site. The date for final comments to NHS England on representations received for this application is 5th December.

Comments to NHS England

- 5.2.4 In relation to the Delmergate application, nothing in the appeals documentation and the responses received causes Charles Russell Speechlys to resile from the points that they made to NHS England and they set them out below for completeness.
- 5.2.5 It is Ackers Chemists case that the application should be refused for the following reasons:-
- 5.2.6 The application is not offering unforeseen benefits
- 5.2.7 The application is made under Regulation 18 of the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2103. This regulation states that the application only falls with regulation 18 if the benefits offered were not in the relevant PNA and were unforeseen. This is seen in at Regulation 18(1)(b), "the improvements or better access that would be secured were . . . not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1."
- 5.2.8 Also at Regulation 18(2)(b), "the NHSCB has to be satisfied ... that granting the application would confer significant benefits on persons in the area of the relevant HWB which were not **foreseen** when the relevant pharmaceutical needs assessment was published." [emphasis added]
- 5.2.9 It cannot be said that the need for a pharmacy in the Ebbsfleet Garden City development is unforeseen. Not only was it mentioned in the 2015 PNA, but in the current PNA, it is mentioned twice; first in the overarching document - the Kent Health and Wellbeing Board PNA and also in the Dartford/Gravesend/Swanley and surrounding areas CCG document at page 15. The passage at page 15 is detailed and says:-

"Ebbsfleet Garden City- A major housing development was identified in 2015 for the Ebbsfleet area, to be known as Ebbsfleet Garden City, with up to 15,000 homes initially. It was highlighted in the 2015 PNA as possibly needing extra pharmaceutical services in the future. This area is marked on a map in Appendix A and the development lies across the Dartford/Gravesham Council boundaries. Although building has been slow to happen, it has been estimated that nearly 750 units will be ready for occupation in the area by 2018. This means that it has now been identified that there may be need for pharmaceutical services in the area within the life of this PNA dependent on the capacity of the surrounding pharmacies. There are already over 40 pharmacies servicing the population of Dartford and Gravesham and it may

be more appropriate to invite relocation of one or more of these pharmacies into the Ebbsfleet area rather than open yet another contract."

- 5.2.10 The application therefore should therefore not have been made under regulation 18.
- 5.2.11 Granting the application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services
- 5.2.12 Notwithstanding Charles Russell Speechlys previous comments, should the application be considered under regulation 18, at 18 (2)(a), NHS England has to have regard to whether it is satisfied that granting the application would cause significant detriment to "proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB"
- 5.2.13 If it is satisfied as mentioned in regulation 18 2(a), it must refuse the application.
- 5.2.14 It is clear through the PNA that NHS England is aware of the issue of pharmaceutical needs in the Ebbsfleet area and is vigilant in relation to the evolving position. It is also clear from the comments in the PNA quoted above that there is a preferred strategy to relocate pharmacies if possible rather than open new pharmacies, bearing in mind the high level of pharmaceutical provision that already exists in the area. For that reason, the grant of an application for inclusion in the pharmaceutical list, rather than a relocation, would prejudice NHS England's ability to arrange pharmaceutical services in the area in the way it has planned. This is because, once a new pharmacy has opened, there would be an over-supply of essential services and/or all pharmacy services if a further applicant wished to relocate into the area which would prevent the grant of another application.
- 5.2.15 The application is flawed
- 5.2.16 The hours offered by the Delmergate application demonstrate no understanding of local needs and are not responsive to local GP surgery opening hours or the demands of the local population.
- 5.2.17 The application is premature
- 5.2.18 Even if this application is granted it is unlikely that premises will be available in the time permitted for the applicant to file a Notice of Commencement.
- 5.2.19 In relation to the information now before us and without prejudice to our position that this application cannot validly be made under Regulation 18, we have a number of additional comments.
- 5.2.20 The PNA
- 5.2.21 The Inaltus report misquotes paragraph 4 of schedule 1. The correct wording is "*would, if they were provided . . . , secure improvements, or better access, to pharmaceutical services, ... in its area.*" It is artificial to suggest that a PNA that specifically discussed the need for a pharmacy in an area is not talking about an improvement to the service. The PNA specifically states there is "*a need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services*" There is no requirement for the PNA to break down that statement to specify the definition of pharmaceutical services or explicitly state that the provision of pharmaceutical services in an area will be an improvement.

- 5.2.22 There is no "no-man's land" in these circumstances. The improvement required by the PNA is for pharmaceutical services as defined in the regulations. Our client has made the applications set out above which satisfy the requirements in the PNA in all respects.
- 5.2.23 Progress of the development
- 5.2.24 Charles Russell Speechlys consider the Kent LPC are right to highlight the slow development of the Ebbsfleet Garden City.
- 5.2.25 The report by Inaltus recites the original development plan in detail. However, the outline planning permission was, as has been stated, granted on 13 November 2007 which is over 11 years ago.
- 5.2.26 NHS England highlight that their consideration was primarily focussed on the current situation. The application here is not an application for future needs. Currently the population travel to Swanscombe to access local shops, and to Northfleet, three miles away for a large supermarket.
- 5.2.27 Significantly, there is no health centre so the new residents of Ebbsfleet will be travelling to Swanscombe to attend the Swanscombe Health Centre, to Ivy Bower Surgery in Greenhithe or Forge Surgery in Gravesend. Therefore the healthcare and other needs of the residential population of the Castle Hill area are being met in Swanscombe and surrounds.
- 5.2.28 Regulation 18 criteria
- 5.2.29 Even if Primary Care Appeals find that the application should have been brought under regulation 18, the application itself does not meet the regulation 18 criteria in that it does not provide significant benefit or secure improvements for better access to pharmaceutical services.

Choice

- 5.2.30 NHS England had to have particular regard to there being reasonable choice with regard to obtaining pharmaceutical services. The pharmacy report at page 26 details 9 pharmacies within 4 miles. There in fact appear to be 40 pharmacies within 4 miles according to NHS data. This seems to show why NHS England favour a relocation application. The figures alone suggest there is reasonable choice for a community where the population are already travelling outside their immediate area to access a GP surgery and obtain food and all other needs.
- 5.2.31 The passage on page 37 regarding the inability of Swanscombe to meet the needs of Castle Hill and Eastern Quarry talks in the present tense about the size of Castle Hill; however, what they are talking about is the projected figures and, as NHS England makes clear at page 4, the number of completed houses, 1,174, does not equate to houses being sold, inhabited or in a projected outline plan.
- 5.2.32 In any event, Charles Russell Speechlys are instructed the Swanscombe pharmacies are able to cater for any increased demand for services from the Castle Hill population.
- 5.2.33 In addition, some of the material presented in relation to access to local resources is misleading as follows:
- 5.2.34 Gradient- Charles Russell Speechlys attach a map (appendix C) showing the contour lines of the area which shows that the spot measurements given by

Inaltus are misleading and there are only slight gradients between the newly developed site and the established buildings in Swanscombe

- 5.2.35 Topography of the footpath from the south of Swanscombe/Castle Hill area. The foot path pictured (Section 3.20 picture) is a desire line from the football field to the road to the east of Swanscombe and Castle Hill. The newly developed footpath and cycle route between Swanscombe and Castle Hill is not featured in the report.
- 5.2.36 Bus links - The Inaltus report suggests there is only one bus route serving Castle Hill which is the 481. In fact, the 485a runs from Mercer Avenue and Castle Hill Centre to Swanscombe railway station and takes 6 minutes. We attach a copy of the timetable.
- 5.2.37 There is a 100 space car park close to the Swan Valley Pharmacy. The report does not cover whether there were spaces available at the time of the site visit so we assume there were free spaces.

Protected characteristics

- 5.2.38 NHS England had to have particular regard to the desirability of people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access. There is no evidence that any person sharing a protected characteristic is finding it difficult to access pharmaceutical services.
- 5.2.39 Even if such evidence was available, the services offered by the Delmergate application are not extensive. Unlike Ackers Chemists pending application under regulation 15, there is no Sunday opening.
- 5.2.40 The weekday opening is only until 17:30 so does not provide pharmaceutical services to those with acute prescriptions from the evening surgery at Swanscombe Health centre (Weds), the Forge Surgery in Gravesend (Monday until 8pm) or Ivy Bower Surgery in Greenhithe (6:30pm on Tues, Thurs and Fri).

Innovation

- 5.2.41 There is no suggestion that there is any innovation in the approach taken with regard to the delivery of pharmaceutical services.

Detriment

- 5.2.42 Regard has to be had as to whether the application will cause significant detriment to the proper planning for the provision of pharmaceutical services in the HWB's area (regulation 18(2)(a)(i)).
- 5.2.43 NHS England does not specifically refer to this provision in its response to the appeal letter; however, at page 13, it cites conclusions and recommendations for Kent PNA 2018 - Dartford, Gravesham and Swanley area that

"any application must demonstrate that it can improve on the availability of services across the specific area without destabilising the current provision. It is recommended that if a need is identified, whether foreseen or unforeseen, that the current providers are approached to duly establish whether they can meet that need, before a completely new contract is considered."

- 5.2.44 It also says *"there are already over 40 pharmacies servicing the population of Dartford and Gravesham and it may be more appropriate to invite relocation*

of one or more of these pharmacies into the Ebbsfleet area rather than open yet another contract".

5.2.45 To meet the requirement that there is a relocation rather than a wholly new contract, Ackers Chemists, who operates two pharmacies in Swanscombe, is proposing to relocate one of those pharmacies into the Castle Hill area. This clearly conforms to the plan set out in the PNA. If the application by Delmergate Limited is granted, this will be a barrier to the relocation by Ackers Chemists, thus frustrating the NHS England and PNA plan and causing detriment to the proper planning for the provision of pharmaceutical services. For this reason alone, the application should be refused.

Evidence

5.2.46 The application and appeal sets out in great detail the significant benefits if the Ebbsfleet development is completed. As NHS England points out there is no guarantee, in the current economic and political climate that the development will be finalised in the way already envisioned.

5.2.47 The development plans are still being challenged over 10 years from the initial planning applications.

5.2.48 The applicant has not provided sufficient evidence of the significant benefit offered by this application on the basis of the population now or in the immediate future for the application to be granted under the regulation 18 criteria.

5.2.49 In all the circumstances Charles Russell Speechlys would ask the Primary Care Appeals to refuse the appeal by Delmergate Ltd. If Primary Care Appeals are not able to do that then the application should be deferred until Ackers Chemists' application can be determined. If an oral hearing is arranged Ackers Chemists would want to attend and be represented at the hearing.

5.2.50 Ackers Chemists assumes that it will be able to attend and be represented and Ackers Chemists Ltd reserves its rights in this regard.

6 Consideration

6.1 The Pharmacy Appeals Committee ("the Committee"), appointed by NHS Resolution, had before it the papers considered by NHS England, together with a plan of the area showing existing pharmacies and doctors' surgeries and the location of the proposed pharmacy.

6.2 It also had before it the responses to NHS Resolution's own statutory consultations.

6.3 On the basis of this information, the Committee considered it was not necessary to hold an Oral Hearing.

6.4 The Committee had regard to the National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013 ("the Regulations").

Regulation 31

6.5 The Committee first considered Regulation 31 of the Regulations which states:

(1) A routine or excepted application, other than a consolidation application, must be refused where paragraph (2) applies.

(2) *This paragraph applies where -*

(a) a person on the pharmaceutical list (which may or may not be the applicant) is providing or has undertaken to provide pharmaceutical services ("the existing services") from -

(i) the premises to which the application relates, or

(ii) adjacent premises; and

(b) the NHSCB is satisfied that it is reasonable to treat the services that the applicant proposes to provide as part of the same service as the existing services (and so the premises to which the application relates and the existing listed chemist premises should be treated as the same site).

6.6 The Committee noted that the Applicant had stated, in their application form, that there is no other pharmacy in the same or adjacent premises, so Regulation 31 is not applicable. The Committee noted that NHS England had concluded that Regulation 31 was not applicable and further that no party had sought to indicate in subsequent representations that Regulation 31 would require the refusal of this application. Given the information available to the Committee, it determined that it was not required to refuse the application under the provisions of Regulation 31.

6.7 The Committee noted that, if the application were granted, the successful Applicant would - in due course - have to notify NHS England of the precise location of its premises (in accordance with paragraph 31 of Schedule 2). Such a notification would be invalid (and the Applicant would not be able to commence provision of services) if the location then provided would (had it been known now) have led to the application being refused under Regulation 31.

Regulation 18

6.8 The Committee noted that this was an application for "unforeseen benefits" and fell to be considered under the provisions of Regulation 18 which states:

"(1) If—

(a) the NHSCB receives a routine application and is required to determine whether it is satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB; and

(b) the improvements or better access that would be secured were or was not included in the relevant pharmaceutical needs assessment in accordance with paragraph 4 of Schedule 1,

in determining whether it is satisfied as mentioned in section 129(2A) of the 2006 Act (regulations as to pharmaceutical services), the NHSCB must have regard to the matters set out in paragraph (2).

(2) Those matters are—

(a) whether it is satisfied that granting the application would cause significant detriment to—

- (i) *proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB, or*
 - (ii) *the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area;*
- (b) *whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—*
- (i) *there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB's duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),*
 - (ii) *people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB's duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or*
 - (iii) *there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB's duties under section 13K of the 2006 Act (duty to promote innovation)),*

granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published;

- (c) *whether it is satisfied that it would be desirable to consider, at the same time as the applicant's application, applications from other persons offering to secure the improvements or better access that the applicant is offering to secure;*
- (d) *whether it is satisfied that another application offering to secure the improvements or better access has been submitted to it, and it would be desirable to consider, at the same time as the applicant's application, that other application;*
- (e) *whether it is satisfied that an appeal relating to another application offering to secure the improvements or better access is pending, and it would be desirable to await the outcome of that appeal before considering the applicant's application;*
- (f) *whether the application needs to be deferred or refused by virtue of any provision of Part 5 to 7.*
- (g) *whether it is satisfied that the application presupposes that a gap in pharmaceutical services provision has been or is to be created—*
 - (i) *by the removal of chemist premises from a pharmaceutical list as a consequence of the grant of a consolidation application, and*
 - (ii) *since the last revision of the relevant HWB's pharmaceutical needs assessment other than by way of a supplementary statement.*

- (3) *The NHSCB need only consider whether it is satisfied in accordance with paragraphs (2)(c) to (e) if it has reached at least a preliminary view (although this may change) that it is satisfied in accordance with paragraph (2)(b)."*
- 6.9 The Committee considered that Regulation 18(1)(a) was satisfied in that it was required to determine whether it was satisfied that granting the application, or granting it in respect of some only of the services specified in it, would secure improvements, or better access, to pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB
- 6.10 The Committee went on to consider whether Regulation 18(1)(b) was satisfied, i.e. whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.
- 6.11 Paragraph 4 of Schedule 1 requires the PNA to include: *"a statement of the pharmaceutical services that the HWB had identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied (a) **would** if they were provided....secure improvements or better access, to pharmaceutical services... (b) **would** if in specified future circumstances they were provided...secure future improvements or better access to pharmaceutical services..."* (emphasis added).
- 6.12 The Committee considered the Pharmaceutical Needs Assessment prepared by Kent Health and Wellbeing Board dated March 2018 (the "PNA"), conscious that the document provides an analysis of the situation as it was assessed at the date of publication. The Committee bears in mind that, under Regulation 6(2), the body responsible for the PNA must make a revised assessment as soon as reasonably practicable (after identifying changes that have occurred that are relevant to the granting of applications) unless to do so appears to be a disproportionate response to those changes. Where it appears disproportionate, the responsible body may, but is not obliged to, issue a Supplementary Statement under Regulation 6(3). Such a statement then forms part of the PNA. The Committee noted that NHS England had indicated at paragraph 4.1.55 above that two Supplementary Statements had been issued following publication of the PNA but that these were not relevant to this application. The Committee noted that no other party has referred to these Supplementary Statements and so it did not consider them further.
- 6.13 The Committee noted a document, referred to as Kent PNA for Dartford, Gravesend, Swanley and surrounding areas co-terminus with Dartford Gravesham and Swanley CCG, which was also dated March 2018, had been published. The Committee noted that this document had been written as part of the main Kent PNA to allow judgements to be made using local data. The Committee further noted that this document should be read in conjunction with the main Kent PNA. For the purpose of this determination and to make clear which document is being referred to:
- 6.13.1 the full 2018 Kent PNA is referred to as the "PNA";
- 6.13.2 the main Kent PNA document will be called the "Overarching PNA Document"; and
- 6.13.3 the Kent PNA for Dartford, Gravesend, Swanley and surrounding areas co-terminus with Dartford Gravesham and Swanley CCG document will be referred to as the "Locality PNA Document".
- 6.14 The Committee considered the comments from the parties as to whether Regulation 18(1)(b) was satisfied, i.e. whether the improvements or better access that would be secured if the application was granted were or was included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.

- 6.15 The Applicant is of the opinion that the PNA does not set out the improvements or better access that would be secured if the application is granted. NHS England, the local LPC and Ackers Chemist Ltd (“Ackers”) disagree. NHS England considers that the wording of the PNA identifies a future need for pharmaceutical services at the proposed location such that the improvements or better access offered by the Applicant are not unforeseen. The LPC states *“this is not an unforeseen benefit”*. Ackers are of the opinion that the application should not have been made under Regulation 18 as, when considering the wording set out in the PNA, it cannot be said that the need for a pharmacy in Ebbsfleet Garden City development is unforeseen.
- 6.16 The Committee also noted that, while the Kent Health and Wellbeing Board (the “HWB”) had declined to provide any comments on the appeal, it had provided comments to NHS England in the initial determination of the application stating that it felt the application should not be considered under Regulation 18 as developments and any potential future gap in provision were referenced in the 2015 and 2018 PNAs.
- 6.17 As there was no dispute that the 2018 PNA was the relevant PNA for the purpose of this appeal, the Committee considered the references in the PNA to the Ebbsfleet area.
- 6.18 The Committee reviewed the PNA and found the following references to Ebbsfleet:

Reference	Wording
Page 5 of the Overarching PNA Document	<p><i>“The key findings and recommendations of the PNA steering group are</i></p> <p>...</p> <p><i>There are proposed major housing developments across Kent, the main one being Ebbsfleet Garden City and Chilmington Green. This will mean that these areas will need to be reviewed on a regular basis to identify any increases in pharmaceutical need. Locality specific areas are listed within the locality documents.”</i></p>
Page 25 of the Overarching PNA Document	<p>“Housing</p> <p><i>Kent is recognised as an area of where the housing stock is likely to increase considerably in the next 20 years. Consultation with Kent County Council planners and the local district planning offices has highlighted some areas where large increases in both new housing and leisure facilities will affect the pharmaceutical needs of the population. Planned large housing developments in areas such as Ebbsfleet Garden City and Chilmington Green may result in the PNA for those areas needing to be reassessed. Plans affecting individual localities are mentioned in the relevant locality documents.</i></p> <p><i>Most of the district areas have produced their long term plans and planners will inform the HWB of any long term projects which could have an impact on the health needs of a district. The district maps also show many areas where infilling is proposed which could affect the health needs of an area. These will be reviewed regularly.”</i></p>
Page 15 of the Locality PNA Document	<p>“Ebbsfleet Garden City</p> <p><i>A major housing development was identified in 2015 for the Ebbsfleet area, to be known as Ebbsfleet Garden City, with up to 15,000 homes initially. It was highlighted in the 2015 PNA as possibly needing extra pharmaceutical services in the future. This area is marked on a map in Appendix A and the development lies across the Dartford/Gravesham Council boundaries. Although building has been</i></p>

	<p><i>slow to happen, it has been estimated that nearly 750 units will be ready for occupation in the area by 2018. This means that it has now been identified that there may be need for pharmaceutical services in the area within the life of this PNA dependent on the capacity of the surrounding pharmacies. There are already over 40 pharmacies servicing the population of Dartford and Gravesham and it may be more appropriate to invite relocation of one or more of these pharmacies into the Ebbsfleet area rather than open yet another contract.”</i></p>
<p>Page 17 of the Locality PNA Document</p>	<p>“Sundays</p> <p><i>There is good provision of full pharmaceutical services in and around Dartford, Gravesham and Swanley on a Sunday.</i></p> <p><i>Therefore pharmaceutical services are mainly good across the area and we do not need any more providers in the area except</i></p> <p><i>1) A need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA. This should be met by relocation of some of the current services.</i></p> <p><i>2) There may be a future need for specialist pharmaceutical service provision (specifically for tourists and visitors) in the future within the London Resort when this area is developed.”</i></p>

- 6.19 The Committee noted that the parties to the appeal had, between them, referred at various points to the first, second and fourth references above. The Committee considered each reference above in turn.
- 6.20 The reference at page 5 of the Overarching PNA Document appeared to the Committee to be recognition that there was a proposed development in the relevant area and that regular reviews would indicate if there was a change in pharmaceutical needs. The Committee did not consider that a reference to a particular development, proposed or actual, was enough to be satisfied that the HWB had identified a need, current or future, or improvements or better access to pharmaceutical services. Similarly, the reference in the PNA to regular reviews was not enough to satisfy the Committee that the PNA had identified a current or future need or improvements or better access.
- 6.21 The reference at page 25 of the Overarching PNA Document reflected the wording at page 5 and the Committee similarly considered that this wording was not enough to be satisfied that the HWB had identified a need, current or future, or improvements or better access to pharmaceutical services.
- 6.22 The Committee was not satisfied that the two references above in the Overarching PNA Document identified a need, current or future or improvements or better access to pharmaceutical services.
- 6.23 The reference at page 15 of the Locality PNA Document includes the words *“it has now been identified that there may be need for pharmaceutical services in the area within the life of this PNA dependent on the capacity of the surrounding pharmacies”*.
- 6.24 The Committee noted that certain parties to the appeal considered that this was an identified future need. A future need is an application to which Regulation 15 relates. Regulation 15(1) states:

(1) If-

(a) *the NHSCB receives a routine application and is required to determine whether granting it, or granting it in respect of some only of the services specified in it, would meet a future need for pharmaceutical services, or pharmaceutical services of a specified type, in the area of the relevant HWB; and*

(b) *the future need has been included in the relevant pharmaceutical needs assessment in accordance with paragraph 2(b) of Schedule 1,*

in determining whether it is satisfied as mentioned in section 129(2A) of the 2006 Act (regulations as to pharmaceutical services), the NHSCB must have regard to the matters set out in paragraph (2).

6.25 Paragraph 2(b) of Schedule 1 states:

(2) *A statement of the pharmaceutical services that the HWB has identified (if it has) as services that are not provided in the area of the HWB but which the HWB is satisfied--*

(a) *...*

(b) *will, in specified future circumstances, need to be provided (whether or not they are located in the area of the HWB) in order to meet a future need for pharmaceutical services, or pharmaceutical services of a specified type, in its area.*

6.26 The Committee considered whether the wording at page 15 of the Locality PNA Document could be considered a statement as set out in paragraph 2(b) of Schedule 1.

6.27 The Committee considered that the wording at page 15 indicated that the HWB had identified that there was a possible need within the life of the PNA. The Committee considered that paragraph 2(b) of Schedule 1 required the HWB to be satisfied that pharmaceutical services “will” need to be provided, i.e. there was a threshold of certainty that needed to be achieved.

6.28 Paragraph 2(b) also requires the statement in the PNA to set out specified future circumstances in which services will need to be provided. The Committee was of the view that the PNA had not set out the specified future circumstances in which services would need to be provided in order to meet any future need. The Committee considered that the phrase “within the life of the PNA” was likely to be a reference to the three year period for which a PNA is usually in force. To state that a need may arise at some point in the next three years did not appear to the Committee to be specific enough to constitute specified future circumstances as required by paragraph 2(b) of Schedule 1.

6.29 The Committee considered that the level of certainty and specificity that paragraph 2(b) required was not reflected in the wording at page 15.

6.30 The Committee appreciated that where a development was proposed or underway it could be difficult for a HWB to be certain exactly when a need may materialise. The Committee considered, however, that paragraph 2(b) envisaged required there to be reference to a particular circumstance that once occurred would trigger the need for pharmaceutical services. The Committee considered that such circumstances could include the opening of a particular local amenity such as a GP practice or the completion of a set number of houses in a development.

6.31 Additionally, the Committee noted that the potential need referred to at page 15 was stated to be dependent on the capacity of the surrounding pharmacies. It appeared to the Committee that the HWB considered that there may not be a need if the

surrounding pharmacies were able to absorb any additional demand. The Committee considered that this further supported the position that there was uncertainty as to whether there would be a need for pharmaceutical services in the future.

- 6.32 The Committee went on to consider the reference at page 25 of the Locality PNA Document. This included the wording, in the section relating to the provision of services on Sundays, "*A need for pharmaceutical services in the area of Ebbsfleet within the life of this PNA.*".
- 6.33 The Committee noted that the need here was not indicated to be a potential need – there was no reference indicating that services "may" be needed. The wording here appeared more certain than the wording at page 15. The Committee noted, however, that the HWB had again indicated that the need would occur "*within the life of the PNA*". This mirrored the wording at page 15. The Committee considered that, in the same was as for the wording at page 15, this phrase lacked any specified circumstances required by paragraph 2(b) of Schedule 1.
- 6.34 The Committee highlighted the conflicting statements in the Overarching PNA Document, which when referring to Ebbsfleet provided no wording that could reasonably be considered to be identifying a current or future need, and the wording in the Locality PNA Document, which in two places provided wording which at first glance might be considered as identifying a future need but on further consideration lacked the certainty and/or specificity to comply with paragraph 2(b) of Schedule 1.
- 6.35 The Committee considered that the PNA did not set out a future need as envisaged by Regulation 15. While the PNA contained references to service provision in the Ebbsfleet area, the wording in the PNA did not identify a current or future need as required by paragraph 2 of Schedule 1.
- 6.36 The Committee went on to consider whether there was wording in the PNA that complied with paragraph 4 of Schedule 1 of the Regulations.
- 6.37 Paragraph 4 relates to a statement in the PNA relating to securing improvement or better access, either currently or in specific future circumstances. The Committee noted that no party had indicated that the wording in the PNA referred to securing improvements or better access.
- 6.38 The Committee considered that the improvements or better access that would be secured if the application was granted were not or was not included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.
- 6.39 The Committee was therefore satisfied pursuant to Regulation 18(1)(b) that the improvements or better access that would be secured if the application was granted were not or was not included in the PNA in accordance with paragraph 4 of Schedule 1 of the Regulations.
- 6.40 In order to be satisfied in accordance with Regulation 18(1), regard is to be had to those matters set out at Regulation 18(2). The Committee's consideration of the issues is set out below.

Regulation 18(2)(a)(i)

- 6.41 The Committee had regard to

"(a) *whether it is satisfied that granting the application would cause significant detriment to—*

(i) *proper planning in respect of the provision of pharmaceutical services in the area of the relevant HWB"*

- 6.42 In its original determination, NHS England indicated that it was of the view that granting the application would not cause significant detriment to the proper planning of the provision of pharmaceutical services in the HWB's area.
- 6.43 In its comments on the appeal, NHS England made no further reference to this issue.
- 6.44 The Applicant considers that granting the application would not cause significant detriment to proper planning.
- 6.45 Ackers provided comments (see paragraph 2.11.2 above) for the original determination that granting the application would cause significant detriment to proper planning due to NHS England's plan to invite the existing providers to offer to provide services in the area rather than accept a new contractor.
- 6.46 Ackers reiterates this position in its comments on the appeal. It states that granting the application for inclusion in the list rather than a relocation would prejudice NHS England's ability to arrange pharmaceutical services in the way it has planned. Ackers goes on to say that this is because once a new pharmacy has opened, there would be an over-supply of essential services and/or all pharmacy services if a further applicant wished to relocate into the area which would prevent the grant of another application.
- 6.47 The Committee considered that it had already determined that the improvements or better access that the application was looking to secure were not or was not included in the PNA. It therefore could not give any weight to wording in the PNA in relation to an application to relocate an existing pharmacy being preferred over an application to open a new pharmacy.
- 6.48 For completeness, the Committee considered that a health and wellbeing board could set out in a PNA its preference for how any gap in provision should be filled. When determining any application, the decision-maker would need to consider if this was a relevant factor to be taken into account. The Committee considered that wording of the nature set out in this PNA relating to relocations and new providers would not on its own automatically lead to the decision-maker being satisfied that granting the application would cause significant detriment to the proper planning of pharmaceutical services.
- 6.49 The Committee was not satisfied that, if the application were to be granted and the pharmacy to open, the ability of the NHS England thereafter to plan for the provision of services would be affected in a significant way.
- 6.50 The Committee was therefore not satisfied that significant detriment to the proper planning of pharmaceutical services would result from a grant of the application.

Regulation 18(2)(a)(ii)

- 6.51 The Committee had regard to
- "(a) *whether it is satisfied that granting the application would cause significant detriment to— ...*
- (ii) *the arrangements the NHSCB has in place for the provision of pharmaceutical services in that area"*
- 6.52 NHS England in its original determination of the application was not satisfied that granting the application would cause significant detriment to the arrangements for the provision of services. In its comments on the appeal, NHS England did not refer to this point.

- 6.53 The Applicant considers that neither of the two nearest pharmacies display any suggestion that they are not viable and will not continue to thrive in the coming years.
- 6.54 Ackers do not comment on this point in its response to the appeal.
- 6.55 On the basis of the information provided, the Committee had not been provided with any information to suggest that granting the application would cause significant detriment pursuant to this provision. The Committee was therefore not satisfied that significant detriment to the arrangements currently in place for the provision of pharmaceutical services would result from a grant of the application.
- 6.56 In the absence of any significant detriment as described in Regulation 18(2)(a), the Committee was not obliged to refuse the application and went on to consider Regulation 18(2)(b).

Regulation 18(2)(b)

- 6.57 The Committee had regard to

"(b) whether, notwithstanding that the improvements or better access were not included in the relevant pharmaceutical needs assessment, it is satisfied that, having regard in particular to the desirability of—

- (i) there being a reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB (taking into account also the NHSCB's duties under sections 13I and 13P of the 2006 Act (duty as to patient choice and duty as respects variation in provision of health services)),*
- (ii) people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that, in the area of the relevant HWB, are difficult for them to access (taking into account also the NHSCB's duties under section 13G of the 2006 Act (duty as to reducing inequalities)), or*
- (iii) there being innovative approaches taken with regard to the delivery of pharmaceutical services (taking into account also the NHSCB's duties under section 13K of the 2006 Act (duty to promote innovation)),*

granting the application would confer significant benefits on persons in the area of the relevant HWB which were not foreseen when the relevant pharmaceutical needs assessment was published"

Regulation 18(2)(b)(i) to (iii)

- 6.58 The Committee had regard to the location of the proposed site. The Committee noted comments from the parties as to the actual population of the Castle Hill area. It noted that prior to 2009 the area had been a quarry with a population of zero. Since then there had been development resulting in a number of residential properties being built.
- 6.59 The Committee noted the information provided about population in the Castle Hill area. Parties had indicated that between 1174 and 1282 houses had been completed. NHS England, in its comments on the appeal, noted that this number does not necessarily equate to the number of homes sold or occupied.
- 6.60 Although the Applicant had indicated that there may be 4000 persons living in Castle Hill in the next 3 to 4 years (and between 6000 and 7000 in the wider area), the Committee noted that no party had given an estimate of the number of persons

currently living in Castle Hill. In the absence of this information, and having regard to the number of completed homes (noting that not all may be occupied), the Committee considered that the population was likely to be a relatively small number.

- 6.61 The Committee considered that this position was supported by the fact that there was virtually no amenities such as local shops, supermarkets, GP practices, pubs, restaurants, libraries, etc. in the local area. There appears to be a newly opened primary school close by but no secondary school. No information had been provided as to the number of pupils enrolled in the primary school.
- 6.62 The Committee noted that much of the Pharmacy Report submitted with the appeal focussed on the expected future size and extent of the development in Castle Hill and the wider Ebbsfleet Garden City. It included projected amenities and uses of the area and highlighted the expectation that the development would be an “inward-looking” development, possibly attracting people into the area rather than being “outward-looking” where people need to leave the area to access services.
- 6.63 The Committee agreed that there were ambitious plans for the development and that in the future there could be a much larger population, a range of amenities and that the area could be inward-looking.
- 6.64 For the purposes of Regulation 18(2)(b)(i), the Committee was required to consider the desirability of there being reasonable choice with regard to obtaining pharmaceutical services. The Committee therefore needed to consider the position regarding choice at the time it made its decision on the appeal, with an eye on how the area may develop, if at all, in the short term, noting that it can take some months for a pharmacy with a granted application to actually open. The Committee considered that this was not the same as looking forward to a time when the development at Ebbsfleet would be complete as that could be many years away.
- 6.65 The Committee needed to consider if there was any information to suggest that in the short term there were very likely to be significant changes to the situation in relation to pharmaceutical services such that the situation at the time the decision is made does not reflect the true picture.
- 6.66 The Committee noted the comments from the Applicant (indicated above) in relation to possible population levels in 3 to 4 years’ time. The Applicant also indicated that there was potential for 250 homes per year being completed and that this translated into an increase of population of 600 a year. The Committee also noted that NHS England referred to wording in the PNA that indicates that building in the development has been slow to happen. Ackers also points to the slow development.
- 6.67 The Committee also took into account the wording of the PNA that indicated a potential need for pharmaceutical services at some point in the next few years. The Committee considered that the uncertainty as to needs reflected the uncertainty as to the pace of development.
- 6.68 Although the Applicant refers to the fact that the retail development will be completed in the next 12 months, it is not clear on what information this is based. The Pharmacy Report refers to planning permission being granted in September 2017 but that at the time of writing the site was not developed. The Applicant indicated that the developed was going through preliminary development matters but there was no indication of timescales. Ackers comments that, if the application was granted, it is unlikely that the premises will be available in the time permitted for the pharmacy to open.
- 6.69 The Committee therefore considered that the current population of Castle Hill was relatively small. While there is potential for an increase in numbers in the short term, there is little information that provides a reasonable level of certainty as to what the scale of that increase may be.

- 6.70 Given the fact that there are few local amenities, the Committee noted NHS England's comments that residents of Castle Hill are likely to have to travel out of the area for work, GP appointments, secondary education, food and other shopping.
- 6.71 The Committee noted that the Applicant referred to the nearest shopping being in Swanscombe. This was also the site of the nearest pharmacy to Castle Hill. The Committee went on to consider access to existing pharmacies and how this impacted on choice of obtaining pharmaceutical services.
- 6.72 The Applicant has highlighted that there is currently no pharmacy in Castle Hill. There are two pharmacies within a mile or so of the proposed location. The closest is Swan Valley pharmacy in Swanscombe which is stated to be 1.2 km (indicated by NHS England) or 1.4 km (indicated by the Applicant) from the proposed location. Ackers Chemist is the next closest and is also located in Swanscombe at 1.6 km (indicated by NHS England) or 1.7 km (indicated by the Applicant) from the proposed location. The Committee noted the opening times of these pharmacies.
- 6.73 The Applicant queried whether these two closest pharmacies would be able to cope with the additional demand as the population of Castle Hill increased. The Applicant provided a considerable amount of information on the level of deprivation in the Swanscombe area indicating that this would likely put strain on the existing pharmacy provisions. Ackers, which owns Swan Valley pharmacy and Ackers Chemist, indicated that it could cope. The Committee also noted that the Applicant was again focusing on possible future population changes rather than focussing on whether the two pharmacies in Swanscombe were coping with any demand for pharmaceutical services coming from existing residents of Castle Hill.
- 6.74 The Committee considered access to Swan Valley pharmacy from Castle Hill. NHS England indicated that 32% of households in the Greenhithe ward in which Castle Hill was located had access to 2+ cars and/or vans and 85% have access to at least one vehicle.
- 6.75 Looking first at access by car to existing pharmacies by those resident in Castle Hill, the Committee acknowledged the information by the Applicant that Swan Valley pharmacy was co-located with the Swanscombe Health Centre in, according to the Applicant, a campus that includes an Academy, a Library and other community amenities. The Applicant provides evidence that cars were parked on double yellow lines in the pharmacy's vicinity. The Applicant indicates that this was despite the 16 places allocated to the GP practice and an overspill car park of 100 spaces. Ackers point out in observations that the Pharmacy Report does not indicate whether there were empty spaces in the overspill car park or not and assumes that there were.
- 6.76 The Committee considered that there was relatively large amounts of parking close to Swan Valley pharmacy but that it was difficult on the information provided to be sure whether parking would pose a problem to those residents from Castle Hill accessing the pharmacy. As there was no GP practice in Castle Hill, the Committee considered that it was reasonable to consider that if patients were visiting the health centre by car then they would be able to access the pharmacy.
- 6.77 The Committee considered access to Ackers Chemist on Church Road in Swanscombe. The Applicant indicates that this pharmacy is located in a residential area, has three parking spaces outside which are shared with local residents. The Committee noted the Applicant's position that this restricted the ability of persons accessing the pharmacy by car to park close by. The Applicant had also stated that the roads here were narrow.
- 6.78 The Committee noted that parking existed directly outside the pharmacy but was unclear if there was further parking on the streets nearby or how often parking here was restricted.

- 6.79 The Applicant lists another 7 existing pharmacies indicating that these are too far away for consideration. The Committee noted, however, that these pharmacies are all within 4 miles of the proposed location. One is indicated to have limited parking, some of the others are indicated to be within shopping centres or supermarkets which presumably have no parking issues. The Committee therefore considered that these are possible pharmacies that may be accessed by car by persons resident in Castle Hill particularly if a resident is registered with one of the nearby GP practices or a resident works or often visits one of those areas.
- 6.80 The Committee considered that notwithstanding that there might be occasions when residents accessing existing pharmacies by car may find it difficult to park outside the relevant pharmacy, the existing pharmacies can reasonably be accessed by car.
- 6.81 Looking next at access on foot to existing pharmacies, the Committee noted the Applicant's comments that a walking distance of 800m should be considered normal and the two nearest pharmacies are in excess of this. The Applicant indicates that Swan Valley pharmacy takes 17 minutes to walk while Ackers Chemist takes 22 minutes.
- 6.82 NHS England referred to parts of the PNA that provided HWB wide figures for access on foot to pharmacies, i.e. 96% of persons in the HWB area can walk or use public transport to get to a pharmacy within 20 minutes. NHS England appeared to be saying that if a pharmacy can be walked to in 20 minutes then this indicates reasonable access.
- 6.83 The Committee noted the comments of the parties to the topography and the route to the nearest pharmacy. It appeared to the Committee that while there was changes in height at the extreme edges of the areas, the difference in height between the proposed location and the area of the two existing pharmacies was not significant.
- 6.84 Although it was not entirely clear, the Committee considered that the Applicant was saying that the route using pavements on roads to the nearest existing pharmacy took 17 minutes on foot. The Applicant also indicated that there were "informal" links which appeared to be more direct (and presumably quicker) route but that this was along dirt footpaths. The Committee noted the comments from the Applicant about the 40 mph speed limit on the road and the suitability of the footpaths for persons with pushchairs or mobility issues.
- 6.85 The Committee noted Ackers comments that there was a new footpath and cycle path but noted that it had not provided further detail on how this was more appropriate for persons accessing the existing pharmacies on foot as compared to the description of the footpaths given by the Applicant.
- 6.86 In relation to access to existing pharmacies on foot, the Committee considered that while able bodied persons should not have difficulty with the route and time of such a journey, those with mobility issues may find the journey difficult.
- 6.87 The Committee therefore considered the availability of public transport. The Applicant indicated that there was a single bus route serving Bluewater Regional Shopping Centre (4 miles away) and Riverview Park to the east running every 30 minutes. The Applicant had not provided any further information, such as how long the bus ride to Bluewater was or the cost. The Applicant has also stated in its observations that no public transport links exist from the application site to any local pharmacy.
- 6.88 The Committee noted, however, that the Applicant had indicated in its list of the closest 9 pharmacies that a pharmacy was located within the Bluewater centre. The Committee considered that, without further information, this bus route indicated that there was public transport links to an existing pharmacy (albeit one that is 4 km away). It also suggested that access by bus to an existing pharmacy was reasonable.

- 6.89 The Committee noted that no information had been provided as to whether the route to Bluewater went through other areas where existing pharmacies were located. This was relevant because the Applicant goes on to state that a direct link from Castle Hill to Bluewater would require tunnelling through the steep sides of the old quarry. This suggested that a bus link to Bluewater did not take a direct route. It was possible that the route would pass through (and probably stop at) built up areas with pharmacies on its way to Bluewater.
- 6.90 Despite the Applicant's reference to there being a single bus route from Castle Hill, Ackers refers to a further bus route that includes Castle Hill and Swanscombe. While this suggests that there is an additional public transport link to the two closest pharmacies, the timetable provided by Ackers indicates that the further bus route operates a service only in the early morning and later afternoon/evening. It was not clear if there were bus services to Swanscombe during the day.
- 6.91 The Committee considered that the current population of the Castle Hill area is relatively small with little certainty as to how this may increase in the short term. There appears to be high rates of car ownership which enables access to existing pharmacies. For those few without access to a car to drive to an existing pharmacy, there is the option of using rough footpaths or the longer 17 or 22 minute walk along pavements to existing pharmacies. While those without cars and with mobility issues might find the walk to the existing pharmacies longer than comfortable, there is public transport that could be used to access pharmacy services. While the bus to Bluewater was frequent, it is unclear how long this may take. The other bus to Swanscombe appears to run only in the morning and evening meaning access to existing pharmacies in Swanscombe may not be as convenient.
- 6.92 The Committee considered that, taking into account the likely characteristics of the Castle Hill population, there was reasonable access to existing pharmacy services. There may be a very small minority that face inconvenient access to pharmaceutical services but the Committee considered that the total numbers of this group were likely to be very small.
- 6.93 The Committee acknowledged that this number could grow in time as the area developed but it was not clear what that rate of development would be.
- 6.94 The Committee considered that as a whole for the residents of the Castle Hill area there was reasonable choice with regard to obtaining pharmaceutical services.
- 6.95 The Committee therefore considered that, while granting the application could confer a benefit on the very small number of persons for whom access to existing pharmaceutical services was inconvenient, the fact that this would benefit only a small number of persons meant that this benefit could not be considered a significant benefit to persons in the HWB area.
- 6.96 The Committee was of the view that there is already reasonable choice with regard to obtaining pharmaceutical services in the area of the relevant HWB, such that it was not satisfied that, having regard to the desirability of there being a reasonable choice with regard to obtaining services, granting the application would confer significant benefits on persons in the area of the HWB.
- 6.97 In considering Regulation 18(2)(b)(ii) the Committee reminded itself that it was required to address itself to people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access. The Committee was also aware of its duties under the Equality Act 2010 which include considering the elimination of discrimination and advancement of equality between patients who share protected characteristics and those without such characteristics.

- 6.98 NHS England noted in its original determination that the Applicant had not presented any evidence to indicate that there were any persons with protected characteristics who are currently experiencing any difficulty accessing services. It had gone on to indicate that it was not satisfied that, having regard to the specific needs of those with protected characteristics in the area, granting the application would confer significant benefits on persons.
- 6.99 In its appeal, the Applicant stated that many of the homes built on the development are family homes, these will be occupied by parents with young children and many of these will have no access to the family car during the day and therefore necessitating a walk or a bus trip to the nearest pharmacy.
- 6.100 In its comments on the Appeal, NHS England reiterates its previous position, that no information to show that persons with a protected characteristic were having difficulty accessing services that meet specific needs for pharmaceutical services.
- 6.101 Ackers, in its comments on the appeal, shares NHS England's position that there is no evidence that any person sharing a protected characteristic is finding it difficult to access pharmaceutical services.
- 6.102 The Committee considered that the difficulty that persons sharing a protected characteristic may have in accessing services that was indicated by the Applicant, i.e. that there may be parents of young children needing to travel to a pharmacy without the use of car, was speculative. The Applicant had not supported this assertion with evidence and it relied on a number of assumptions that may not in fact be the case.
- 6.103 The Committee noted its comments above on access to existing pharmacies and considered that any benefit would likely not be significant.
- 6.104 The Committee was therefore not satisfied that, having regard to the desirability of people who share a protected characteristic having access to services that meet specific needs for pharmaceutical services that are difficult for them to access, granting the application would confer significant benefits on persons.
- 6.105 In considering Regulation 18(2)(b)(iii) the Committee had regard to the desirability of innovative approaches to the delivery of pharmaceutical services. In doing so, the Committee considered whether there was something more over and above the usual delivery of pharmaceutical services that might be expected from all pharmacies, some 'added value' on offer at the location.
- 6.106 The Applicant indicated in its appeal that it was not seeking to rely on the innovation limb of Regulation 18(2)(b) and provided no further information in this respect.
- 6.107 The Committee was accordingly not satisfied that, having regard to the desirability of there being innovative approaches taken with regard to the deliverability of pharmaceutical services, granting the application would confer significant benefits on persons.

Regulation 18(2)(b) generally

- 6.108 The Committee was of the view that in accordance with Regulation 18(2)(b) the granting of this application would not confer significant benefits on persons in the area of the HWB which were not foreseen when the PNA was published.

Other considerations

- 6.109 Having determined that Regulation 18(2)(b) had not been satisfied, the Committee did not need to have regard to Regulation 18(2)(c) to (e).
- 6.110 No deferral or refusal under Regulation 18(2)(f) was required in this case.

- 6.111 The Committee had regard to Regulation 18(2)(g) and found that it was not relevant to this application.
- 6.112 The Committee considered whether there were any further factors to be taken into account and concluded that there were not.
- 6.113 Pursuant to paragraph 9(1)(a) of Schedule 3 to the Regulations, the Committee may:
- 6.113.1 confirm NHS England's decision;
 - 6.113.2 quash NHS England's decision and redetermine the application;
 - 6.113.3 quash NHS England's decision and, if it considers that there should be a further notification to the parties to make representations, remit the matter to NHS England.
- 6.114 As the Committee had come to different conclusions to NHS England on certain matters, the Committee determined that the decision of NHS England must be quashed.
- 6.115 The Committee went on to consider whether there should be a further notification to the parties detailed at paragraph 19 of Schedule 2 of the Regulations to allow them to make representations if they so wished (in which case it would be appropriate to remit the matter to NHS England) or whether it was preferable for the Committee to redetermine the application.
- 6.116 The Committee noted that representations on Regulation 18 had been sought from parties by NHS England and representations had already been made by parties to NHS England in response. These had been circulated and seen by all parties as part of the processing of the application by NHS England. The Committee further noted that when the appeal was circulated representations had been sought from parties on Regulation 18.
- 6.117 The Committee concluded that further notification under paragraph 19 of Schedule 2 would not be helpful in this case.
- 6.118 The Committee noted that it had received additional comments from Kent Local Pharmaceutical Committee dated 4 December 2018 (copy attached). The Committee noted that these had not been circulated to parties. The Committee considered these additional comments but given its findings above and decision as set out below placed no weight upon them.

7 DECISION

- 7.1 The Committee quashes the decision of NHS England, for the reasons given above, and redetermines the application.
- 7.2 The Committee determined that the application should be refused.
- 7.3 The Committee concluded that it was not required to refuse the application under the provisions of Regulation 31.
- 7.4 The Committee has considered whether the granting of the application would cause significant detriment to proper planning in respect of the provision of pharmaceutical services in the area covered by the HWB, or the arrangements in place for the provision of pharmaceutical services in that area and is not satisfied that it would.
- 7.5 The Committee determined that the application should be refused on the following basis:

- 7.5.1 In considering whether the granting of the application would confer significant benefits, the Committee determined that –
- 7.5.1.1 there is already reasonable choice with regard to obtaining pharmaceutical services;
 - 7.5.1.2 there is no evidence of people sharing a protected characteristic having difficulty in accessing pharmaceutical services; and
 - 7.5.1.3 there is no evidence that innovative approaches would be taken with regard to the delivery of pharmaceutical services.
- 7.5.2 Having taken these matters into account, the Committee is not satisfied that granting the application would confer significant benefits as outlined above that would secure improvements or better access to pharmaceutical services.

Case Manager
Primary Care Appeals

A copy of this decision is being sent to:

Rushport Advisory on behalf of Delmergate Ltd
Kent LPC
Charles Russell Speechlys on behalf of Ackers Chemist Ltd
NHS England